

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-7578

In The
United States Court of Appeals
For The Second Circuit

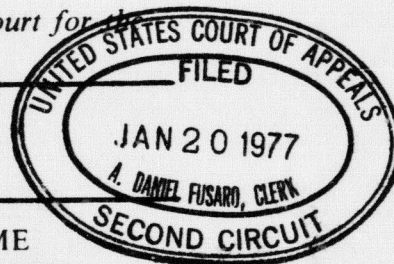
EDWARD BRUCKER and DANIEL R. KAPLAN, as Trustees
under the Trust Agreement dated November 15, 1968, made by
WILTRUD E. GADBOYS, as Grantor, CECIL G. HUSKEY,
E.T. STRATTON and NORTE & CO., a partnership composed
of JOSEPH C. GALDI and RITA D. GALDI,
Plaintiffs-Appellees,

vs.

THYSSEN-BORNEMISZA EUROPE N.V., THYSSEN-
BORNEMISZA, INC., THYSSEN-BORNEMISZA
(Continued on Reverse)

*On Appeal from the United States District Court for the
Southern District of New York.*

BRIEF FOR APPELLANTS



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HOLDINGS, INC., MARINE MIDLAND BANK, INDIAN HEAD INC., JAMES G. FERGUSON, JAMES M. FLACK, ANDREW KALMAN, PAUL W. McALISTER, JOHN E. O'SULLIVAN, RICHARD J. POWERS, JAMES E. ROBISON, ROBERT M. SCHWARZENBACH, MARSHALL F. SMITH, HERBERT E. BACHRACH, GERALD B. HUIKAMP, WHITE, WELD & CO. INCORPORATED, L. EMERY KATZENBACH, H.H. THYSEN-BORNEMISZA, R.L. GENILLARD and CHEMICAL BANK,

Defendants-Appellees.

WILLIAM B. WEINBERGER,

Plaintiff-Appellee,

vs.

RICHARD J. POWERS, JAMES M. FLACK, ANDREW KALMAN, PAUL W. McALLISTER, JOHN E. O'SULLIVAN, JAMES E. ROBISON, ROBERT M. SCHWARZENBACH, MARSHALL F. SMITH, JAMES G. FERGUSON, THYSEN-BORNEMISZA, INC. and INDIAN HEAD INC.,

Defendants-Appellees.

SHAMROCK CORPORATION, individually, and on behalf of all holders of Common Stock and Warrants of Indian Head Inc., similarly situated,

Plaintiffs-Appellees,

vs.

INDIAN HEAD INC.; THYSEN-BORNEMISZA GROUP N.V.; THYSEN-BORNEMISZA, INC.; WHITE, WELD & CO. INCORPORATED; RICHARD J. POWERS; JAMES E. ROBISON; HERBERT E. BACHRACH; GERALD B. HUIKAMP; L. EMERY KATZENBACH; MARSHALL F. SMITH; H.H. THYSEN-BORNEMISZA; R.L. GENILLARD; THYSEN-BORNEMISZA HOLDINGS, INC. and CHEMICAL BANK,

Defendants-Appellees.

APPEAL OF MORTON P. ROME AND MARJORIE T. ROME, TRUSTEES UNDER TRUST AGREEMENT MADE NOVEMBER 22, 1954, FOR THE BENEFIT OF SALLY P. ROME,

Objectors-Appellants.

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PRELIMINARY STATEMENT

The decision appealed from was rendered by the Honorable Charles E. Stewart, Jr., District Judge for the Southern District of New York. The Memorandum filed November 16, 1976 in support of the judgment and order entered November 19, 1976 by the District Judge has not been reported in the official reports as of this date. Both the Memorandum and Judgment and Order are reproduced in the appendix filed by appellants at 352a-401a.* An unofficial report of the District Judge's opinion, in which Appendix A thereto was omitted, appears in [Current] CCH Fed. Sec. L. Rep. ¶95,775 (S.D.N.Y. Nov. 16, 1976).

* All reference in the brief to "(--a)" are to the appendix filed by appellants.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether approval by the District Court of a class action settlement and merger, over objections of convertible debenture owners and without affirmative consent of each debenture owner affected, was not a construction and application of Rule 23 of the Federal Rules of Civil Procedure in violation of the Rules Enabling Act, which forbids substantive rights to be abridged, enlarged or modified by such procedural rules.
2. Whether Rule 23 of the Federal Rules of Civil Procedure as construed and applied by the District Court to authorize entry of its judgment and order approving a class action settlement and merger is unconstitutional as a denial of due process, as directing impairment of the obligation of contracts, and as a denial of the right to petition for redress of grievances.
3. Whether the content of notice of a hearing under Federal Rule 23(e) to approve a class action settlement and merger, which affected conversion rights of an issue of convertible debentures, was not inadequate as a matter of law when there was omitted therefrom and not disclosed material facts of actual significance in the deliberations of a reasonable debenture owner in determining as a class member his choice of action in the transaction, including, among others, facts that each debenture and the indenture were contracts under the terms of which the conversion rights shall not be altered or impaired without affirmative consent of each debenture owner affected.
4. Whether in approving a Rule 23 class action settlement,

which authorized a statutory merger affecting conversion rights of debentures, the District Court's judgment that the terms of the convertible debentures and the indenture permitted, in the event of a merger, alteration of the right of each debenture owner to convert into common stock to a right solely to convert into a fixed cash sum, without affirmative consent of each debenture owner affected, was not erroneous as a matter of law.

5. Whether the issuance by the District Court in its judgment and order approving a class action settlement and merger of a permanent injunction, prohibiting all class members from prosecuting any individual or class claims arising out of or relating to the matters set forth in the complaints of the suits that were compromised, including any claim related to consummation of the merger, was not improper and erroneous, where, among other things, objectors as debenture owners were unidentified but described class members but not parties to the settled actions, who had instituted, prior to issuance of the permanent injunction, their own separate class action for injunctive, declaratory and other relief that related to some of the settled claims.

6. Whether a class action settlement and merger approved by a judgment and order entered by the District Court involved violations and failures to comply with applicable decisional law of this Circuit, various provisions of the federal securities laws and rules of the Securities and Exchange Commission, and applicable state statutes and common law, as a result of which the Court's approval was legally erroneous.

7. Whether a class action settlement authorizing a "freeze-

out" merger which intentionally destroyed the underlying investment basis for convertible debenture purchases was not inherently unfair and inequitable to objectors and all other convertible debenture owners who did not affirmatively consent, as a result of which the Court's judgment of approval was erroneous and an abuse of discretion.

STATEMENT OF THE CASE

This brief is submitted on behalf of appellants Morton P. Rome and Marjorie T. Rome, Trustees under Trust Agreement made November 22, 1954, for the benefit of Sally P. Rome, ("objectors"), on appeal, pursuant to 28 U.S.C. §1291, from a judgment and order of the Honorable Charles E. Stewart, Jr., District Judge for the Southern District of New York, entered November 18, 1976. (352a-401a) This judgment and order decreed, among other things, that (i) three separate suits, which were not consolidated, but had been stipulated as class actions for purposes of settlement only shall proceed as class actions, (394a) (ii) adjudged the terms and conditions of the stipulated settlement and merger to be in all respects fair, reasonable and adequate, and approved, and (iii) ordered the settlement and a statutory short-form merger consummated. (396a)

Objectors are owners of \$25,000 principal amount of 5 1/2% Convertible Subordinated Debentures of Indian Head Inc. due April 15, 1993 ("Debentures"). (193a-194a) The conversion rights of these Debentures were adversely affected in the manner hereinafter described by the court-approved settlement merger.

Indian Head Inc. ("Indian Head"), a Delaware corporation with principal business offices in New York City, was a broadly diversified industrial company with many plants in the United States and abroad and thousands of employees. (15a, 47a, 94a-95a, 353a) Its common stock was listed and traded on the New York Stock Exchange until September 24, 1974. (17a, 39a, 98a-99a)

In April, 1968, Indian Head originally issued and sold \$25,000,000 of its convertible Debentures. (18a, 50a, 100a) The Trustee under the Indenture, dated as of April 15, 1968 ("Indenture"), is Marine Midland Grace Trust Company of New York. (467a) The Debentures were sold publicly pursuant to a prospectus which represented that Indian Head had applied for listing of the Debentures on the New York Stock Exchange, and that the common stock reserved for issuance upon conversion had been listed on that Exchange. (100a) Shortly thereafter, the Debentures were listed on the New York Stock Exchange. (100a)

Each \$1000 Convertible Debenture was specified by the terms of the Debenture and the Indenture to be convertible at any time, at the owner's option, into 25.974 shares of common stock, or a conversion price of \$38.50 per share. (202a, 508a)

In October, 1973, Thyssen-Bornemisza Group, N.V. ("TBG"), (the name of which was later changed to Thyssen-Bornemisza Europe N.V. ("TBE"), a Netherlands international industrial holding company, acquired 1,200,000 shares of the outstanding Indian Head common stock (about 33.9%) at \$27

per share through a tender offer. (21a, 53a, 106a-107a) An additional 750,000 shares of common stock were then sold by Indian Head to TBG, also at \$27 per share cash. (20a-21a, 53a, 106a-107a)

In August, 1974, Thyssen-Bornemisza, Inc. ("TBI"), a Maryland corporation organized as a wholly owned subsidiary originally of TBG to hold all securities of Indian Head, acquired an additional 3,687,000 shares of Indian Head common stock at \$27 per share cash through a second tender offer. (23a, 56a, 112a)

As a result of these purchases, TBI after August, 1974 owned more than 90% of the Indian Head common stock outstanding, for which a total of more than \$150,000,000 in cash was paid. (23a, 57a, 112a) The Indian Head common stock and Debentures were suspended from trading on the New York Stock Exchange on August 30, 1974 and delisted on September 24, 1974. (17a, 49a, 98a-99a) Thereafter the Debentures and the common stock were traded over-the-counter. (17a, 50a, 104a)

On February 11, 1976, a TBI press release announced that it intended to cause Indian Head to be merged into a newly formed wholly owned subsidiary, Thyssen-Bornemisza Holdings, Inc. ("TBH"), under which, among other things, the Indian Head Debentures would be assumed by TBH. (57a-59a, 113a-115a) After the merger, however, the Debentures would no longer have the right to convert to Indian Head common stock, but only might on surrender receive \$779.22 cash for each \$1000

Debenture, or at the rate of \$30 per share for 25.974 common shares. (58a-59a, 114a-115a) Under this proposed merger, holders of outstanding Indian Head common stock would likewise receive \$30 cash per share. (58a, 114a)

Previously, on December 31, 1974, Edward Brucker and Daniel R. Kaplan, Trustees, who owned \$11,000 principal amount of the Debentures, had commenced an action on behalf of themselves and representatively on behalf of all other persons who were holders and registered owners of the Debentures on or after September 27, 1973, and who had not exercised their conversion rights. (7a-38a)

Defendants named in the original Brucker complaint were TBG, TBI, Indian Head, and individuals who were or are officers and directors of Indian Head, and in the case of one individual, Chairman of the Indian Head Board as well as a member of the TBG top-policy making Supervisory Board. (15a-16a)

This complaint charged violations of Secs. 14(d) and 14(e) and 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78n(d), (e) and 78j(b)), Rule 10b-5 of the Securities and Exchange Commission, and the common law. (23a-36a) The Debenture owners claimed, among other things, that the defendants' failure to send them notice of the tender offers was a violation of those federal securities provisions which prevented them from favorably exercising their conversion rights. (24a) Also claimed was that TBE's acquisition of control of Indian Head constituted a constructive merger in violation of the Indenture. (27a) In

addition, the delisting of the Debentures and common stock from the New York Stock Exchange was alleged to have seriously affected marketability of the Debentures. (27a) Under the common law claim grounded on pendent jurisdiction, it was charged that Indian Head and its directors committed breaches of the Debenture and Indenture contracts and fiduciary obligations owed to the Debenture owners. (32a-36a) Primary relief sought was damages. (36a-37a)

In a combined motion with supporting affidavit the Brucker suit plaintiffs moved for class action determination and summary judgment. (Pltffs.' Affidavit and Notice of Motion for Class Action and Summary Judgt.) Defendants filed a cross-action for dismissal of the complaint or summary judgment. (Dfts. Notice of Cross-Motion for Dismissal, etc.)

These motions were sub judice when on February 11, 1976 the TBI press release referred to above announced the proposed "short form" merger under Sec. 253 of the Delaware Corporation Law of Indian Head into TBH. (57a-59a, 113a-115a)

On February 13, 1976, one day after such announcement of the proposed merger, this Court issued its opinion in Marshall v. AFW Fabric Corp., 533 F.2d 1277 (2d Cir. 1976).^{1/} On February 18, 1970, this Court issued its opinion in Green v. Santa Fe Industries, Inc., 533 F.2d 1283 (2d Cir. 1976).^{2/}

^{1/} Certiorari granted, 45 U.S.L.W. 3279 (Oct. 12, 1976), judgment vacated 45 U.S.L.W. 3279 (Oct. 12, 1976).

^{2/} Rehearing en banc denied in Marshall and Green by this Court, 533 F.2d 1309, Certiorari granted in Green, 45 U.S.L.W. 3249 (Oct. 5, 1976).

On February 20, 1976 in a move to enjoin the proposed merger, an amended class action complaint was filed in the Brucker suit on behalf not only of the Debenture owners previously represented, but also on behalf of all Indian Head common stockholders and all owners of outstanding warrants to purchase Indian Head common stock, although the named plaintiffs did not include any Indian Head common stockholders or warrant owners.^{3/}

This amended complaint named two additional defendants, the Indenture Trustee and TBG, and expanded the claims of the original complaint to charge that alteration of the conversion rights proposed in the merger from a right to convert into

3/ In January, 1975, William B. Weinberger, a former owner of \$15,000 Debentures, who had sold them for a loss in July, 1974, allegedly without knowledge of the two tender offers of September, 1973 and July, 1974, filed another class action in the Southern District of New York, 75 Civ. 229 (CES), claiming damages for deprivation of the opportunity to convert the Debentures into common stock at a time when the common stock was listed on the New York Stock Exchange. (185a-20) A later amendment to the Weinberger complaint, dated June 3, 1975, claimed that this deprivation caused him to lose \$213.43. (75 Civ. 229 (CES)) Although Weinberger had sold his Debentures, his class action was stated to be on behalf of not only those Debenture owners who had sold, but also on behalf of those who had not sold. (75 Civ. 229 (CES))

In April, 1975 still another class action complaint was filed in the Southern District of New York, 75 Civ. 7636 (CES), by Shamrock Corporation, a Virginia corporation, which held 6200 warrants to purchase Indian Head common stock, and was on behalf of all persons who owned the warrants. The basic claim in the Shamrock suit was that the tender offers were unfair. (185a-20) By an amended complaint, dated March 4, 1976, the Shamrock complaint was amended to enjoin the merger proposed by TBI as an unfair "freeze-out" without business purpose, which would render valueless the warrants and violate the defendants' fiduciary duties to the warrant owners. In addition, this amended complaint sought a declaratory judgment that the proposed merger was an anticipatory breach of the warrant and warrant agreement, and was not an event permitting substitution of \$30 cash for a continuing interest in Indian Head. (185a-20-21; 75 Civ. 7636 (CES))

common stock to a fixed cash payment was a breach of contract of the Debentures and Indenture. (64a, 78a) Also claimed was that the merger plan constituted a redemption, and the Debenture owners were thus entitled to a redemption price of \$1030.30 for each \$1000 Debenture, rather than the \$779.22 cash sum contemplated in the proposed merger. (62a-66a) In addition, the proposed merger was charged to be a "freeze-out" without business purpose, involving violations of the federal securities laws and common law fiduciary duties of the defendants. (68a-70a) A hearing on the injunctive relief sought was fixed for March 4, 1976. (360a)

On March 4, 1976, at the outset of the hearing, defendants withdrew the merger proposal (Tr. of March 4, 1976 Proceeding, 360a). (The reasons later stated by defendants for such withdrawal was that "[t]he legal standards enunciated in Green were unclear". (228a) After withdrawal of the proposed merger, counsel for defendants entered into settlement negotiations with counsel for plaintiffs. (360a)

By July 20, 1976, these negotiations had ripened into a Stipulation and Agreement of Settlement among the attorneys for the parties in the Brucker and Weinberger actions. (160a-185a-47) On July 26, 1976 there was filed and docketed a second amended complaint of Brucker and Kaplan, with the consent of all the defendants. (84a-147a)

This second amended complaint included all claims asserted in the original and amended complaints, and added as parties plaintiffs two beneficial owners of Indian Head warrants, Cecil B. Huskey, owner of 3100 warrants, and W. T.

Stratton, owner of 6000 warrants. (94a) Also added as parties plaintiffs was a partnership, Norte & Co., composed of Joseph C. Galdi and Rita D. Galdi, owner of 32 shares of Indian Head common stock since February, 1975. (94a)

Likewise named in this second amended complaint, consented to by the defendants, were five additional individual defendants, including H. H. Thyssen-Bornemisza, a Swiss resident and the Indian Head controlling person through a complex network of foreign and domestic corporations, including TBE (formerly TBG), and TBI. The investment banker of TBE and Indian Head, White Weld & Co. Incorporated, and Chemical Bank of New York, Indian Head's Warrant Agent were also named as defendants. (94a-98a)

The scope of the claims theretofore asserted in the earlier Brucker complaints were considerably broadened in the second amended complaint. (84a-147a)

On July 28, 1976, an Amendment to Stipulation and Agreement of Settlement was effected in which the attorneys in the Shamrock suit joined the compromise. (186a-192a)

The terms of the Stipulation and Agreement of Settlement and its Amendment, by consent of the defendants and upon order of the Court, included, among other things, the following provisions material and pertinent to this appeal:

1. The Brucker, Weinberger and Shamrock actions were agreed to be maintained as class actions, for purposes of settlement only, on behalf of (i) a Common Stock class; (ii) a

Debenture Owner Class;^{4/} (iii) Debenture Seller Classes, consisting of a Debenture Seller Class A and Debenture Seller Class B; (iv) Warrant Owner Classes, consisting of a Warrant Owner Class A and Warrant Owner Class B; and (v) Warrant Seller Classes, consisting of a Warrant Seller Class A and a Warrant Seller Class B. (149a-150a)

2. Class representatives designated were: (i) Brucker and Kaplan as representatives of all the foregoing classes; (ii) Weinberger as representative of the Debenture Owner Class and Debenture Seller Classes; (iii) Huskey, Stratton and Shamrock Corporation as representatives of the Warrant Owner Classes and Warrant Seller Classes; and (iv) Norte & Co., as representative of the Common Stock Class. (151a)

3. Counsel designated for the classes were: (1) Austrian, Lance & Stewart, P.C. as lead counsel for all classes; (ii) Weinstein & Levinson as co-counsel for the Debenture Owner Class and Debenture Seller Classes; and (iii) Wolf, Haldenstein, Adler, Freeman, Herz & Frank as co-counsel for the Warrant Owner Classes and Warrant Seller Classes.^{5/} (151a)

4/ This class was defined to consist of: "All owners, beneficially or of record, of 5 1/2% convertible subordinated debentures due April 15, 1993 of Indian Head ("Debentures") on August 2, 1976 who continue to own such Debentures on the Merger Date"--the "Merger Date" being the date of the merger to be effected as provided in the Settlement Agreement. (164a) August 2, 1976 was the date of the Court Order determining that the actions be maintained as class actions for purposes of settlement only, and, among other things, designating class representatives, lead counsel for all classes and co-counsel for the classes, fixing a hearing for October 13, 1976, and ordering Notice to be given. (148a)

5/ No co-counsel was assigned for the Common Stock Class, thereby relegating that role to Austrian, Lance & Stewart, P.C., lead counsel for all classes.

4. Upon approval of the settlement by the Court, including the merger therein provided for, among other things, TBI agreed:

(i) to cause Indian Head to be merged into TBH pursuant to Section 253 of the Delaware General Corporation Law; (162a)

(ii) to pay to each Indian Head common stock owner \$32.00 per share upon the merger and submission of stock certificates; (162a)

(iii) to pay after the merger each member of the Debenture Owner Class \$844.16 per Debenture in exchange for each such Debenture; ^{6/} (162a)

(iv) to pay after the merger to each member of the Debenture Seller Class A, consisting of those who sold between September 23, 1973 and July 1, 1974, the amount by which \$650 exceeded the selling price for each Debenture sold, but not more than \$50 for each such Debenture; (162a)

(v) to pay after the merger to each member of the Debenture Seller Class B, consisting of those who owned on

6/ It is to be noted that no specific statement was made in the text of the Stipulation and Agreement of Settlement and Amendment (160a-192a) that upon consummation of the merger contemplated by the Settlement Agreement, an owner of Debentures would no longer have the right to convert such Debentures into common stock, but would be entitled only to receive a cash payment of \$831.17 upon surrender for conversion of each Debenture. This only appears in Paragraph 21 of Exhibit "B" to the Settlement Agreement, (185a-28-29), which was the Notice of Settlement Hearing, the substantial form of which was agreed upon in Paragraph 1(e) of the Settlement Agreement (166a), and ordered to be mailed by TBI within ten business days after the Court Order, dated August 2, 1976, to each member of the classes designated by the Settlement Agreement and the Court Order. (148a at 152a)

July 2, 1974 and sold between July 12, 1974 and August 2, 1976^{7/}
(162a) the amount by which \$701.00 exceeded the selling price
for each Debenture sold, but not more than \$100 for each such
Debenture. (162a)

5. A form of Notice attached as Exhibit "B" to the
Stipulation and Agreement of Settlement "fully and fairly"
described the terms of the settlement and merger provided for
in the compromise. (167a)

(i) On the subject of the contents of the notice,
among other things, the terms of the Stipulation provided that
"no person, other than a class member who does not request ex-
clusion in the manner provided for....(i.e., by mailing a
written request for exclusion, postmarked no later than fifteen
(15) days prior to the hearing set by Court Order on approval
of the settlement), may object to the approval of the settlement
provided for in....(this) Agreement....". (155a)

6."....[T]he institution, maintenance, or prosecution
of any and all actions, suits, claims arbitrations or any other
proceedings by any person arising out of or relating to the
subject matter of any of the pleadings in the....actions (being
settled), the terms of this Agreement or the Merger provided
for...(in the Settlement) shall be stayed and enjoined in any
court other than before the Honorable Charles E. Stewart, Jr.
of the United States District Court for the Southern District
of New York pending entry of a judgment and order determining

^{7/} August 2, 1976 was the date of the Court Order designating
Classes and scheduling hearing on notice. (148a)

whether the settlement and merger as provided for in this Agreement are fair, reasonable and adequate."^{8/} (156a-167a)

7. Upon approval of the settlement by the Court, including the merger therein provided for, the judgment and order shall be entered:

"Permanently enjoining all plaintiffs and class members and their heirs, executors, administrators, personal representatives, successors and assigns from prosecuting any individual, class or derivative claims arising out of or relating to the matters set forth in the complaints, including any claim related to consummation of the merger, other than a proceeding for appraisal pursuant to Section 262 of the Delaware Corporation Law, against any of the defendants whether or not served with a summons and complaint, their personal representatives, trustees, heirs and assigns and, as to the corporate defendants, in addition, their predecessors, successors, parents, subsidiaries, affiliates and present or former directors, officers, employees, attorneys and agents or against any other person; and permanently enjoining all Indian Head common stockholders, including any who submit written requests for exclusion from the Common Stock Class, from prosecuting any derivative claims arising out of or relating to said matters." ^{9/} (181a)

On August 2, 1976 the Court entered its Order, practically in haec verba as that submitted by the parties to the Settlement. (148a)-157a) This Order directed that the three actions should be maintained as class actions for purposes of settlement only, designated the class representatives and lead

8/ The inclusion of this "stay" and "injunction," though appearing in the Stipulation and Agreement of Settlement and Amendment thereto, as well as the Court Order, dated August 2, 1976, did not appear in the Notice of Hearing on the Settlement. (185a-11-185a-30) (See Exhibit "A" in Addendum to this brief for the notice form actually mailed. This was attached to Brief in Support of Objections to Proposed Settlement.)

9/ The inclusion and notice of this proposed "permanent injunction," in the event of Court approval of the settlement, likewise did not appear in the Notice of Hearing on the Settlement. (185a-11-185a-30) (See Exhibit "A" in Addendum to this brief.)

counsel and co-counsel for the classes, fixed a settlement hearing on October 13, 1976, and ordered that a notice of the hearing, and of the settlement terms be sent to all members of the various classes. (148a-157a)

Objectors, as owners of Debentures, were unidentified but described "class members" of "the Debenture Owner Class" within the definition of that class as constituted in the stipulated settlement. (149a)

Upon receipt of the notice of class action, proposed settlement and hearing, objectors filed a timely notice of intention to appear, object and show cause why the proposed settlement should not be approved, together with papers supporting their objections. (193a-206a) Objectors also appeared at hearings held October 13 and 18, 1976 on the settlement and contested the legality of the compromise as it affected them and other owners of Debentures who had not affirmatively consented to the settlement terms, which affirmative consent objectors contended was required by the terms of the Debentures and the Indenture pursuant to which those securities were issued. (207a, 273a)

The District Court in a Memorandum filed November 16, 1976 concluded that the settlement was fair and reasonable, and should be approved (352a-392a) and by judgment and order entered November 19, 1976 approved the settlement and merger and directed its consummation. (393a-401a)

In addition, the District Court's judgment permanently enjoined "[a]ll class members from prosecuting any individual,

class or derivative claims arising out of or relating to the matters set forth in the complaints (of the settled actions), including any claim relating to the consummation of the merger, other than a proceeding for appraisal pursuant to Section 262 of the Delaware General Corporation Law....". (400a)

Objectors, together with another owner of Debentures who had requested exclusion from the settlement (407a), had filed on November 16, 1976, (before receipt of the District Court's Memorandum and the entry on November 19, 1976 of the judgment and order appealed), in the United States District Court for the Southern District of New York, 76 Civ. 5129 (CES), a separate class action complaint on behalf of themselves and representatively on behalf of all other owners of Debentures who did not affirmatively consent to the settlement. (407a-408a)^{10/} This independent suit asserted some claims arising out of or relating to the matters set forth in the complaints of the settled actions. (407a) Because the scope of the District Court's permanent injunction included unidentified but described "class members," the separate class action suit of objectors could fall within the terms of this injunction, although objectors were not parties to the actions settled, but, as was their right, simply had appeared at the hearing on the settlement and contested the legality of the compromise as it affected

^{10/} The filing of this suit in the United States District Court for the Southern District of New York before Judge Charles E. Stewart, Jr. was made because of the "stay" and "injunction" against suits in any other court included in the Order, dated August 2, 1976 (407a-408a; 76 Civ. 5129 (CES)), as provided in the Stipulation and Agreement of Settlement, despite the questionable effect of such injunction under Rule 65(d) of the Federal Rules.

them and other owners of Debentures who had not affirmatively consented to the settlement. (405a-411a)

In an effort to effect dissolution of the permanent injunction issued in the District Court's judgment and order entered November 19, 1976, objectors timely filed a Motion to Alter or Amend Judgment, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. (402a-411a) Objectors also filed an Application for Partial Stay of Judgment and Order Pending Appeal and Motion for an Order Clarifying and Supplementing Record. (413a-423a) These motions and application were denied by the District Court on November 29, 1976 (412a, 426a, 433a), on which date objectors filed a notice of appeal from the judgment entered November 19, 1976. (465a-466a)

ARGUMENT

I. THE JUDGMENT APPROVING THE SETTLEMENT AND MERGER VIOLATED THE RULES ENABLING ACT

Under the Rules Enabling Act (28 U.S.C. 2072, as amended), the Congress conferred on the Supreme Court the power to prescribe by general rules, among other things, the practice and procedure of the district courts in civil actions. However, the Enabling Act specifically provided that:

"Such rules shall not abridge, enlarge or modify any substantive right. . . ."

Thus the Federal Rules of Civil Procedure govern procedure only and not the substantive rights of parties who invoke the jurisdiction of federal courts, and no authority exists in any of the Federal Rules, including Rule 23, to abridge, enlarge or modify any substantive rights.

As the Supreme Court pointed out in Snyder v. Harris, 394 U.S. 332, 336 (1969), the procedural provisions of Rule 23 cannot alter substantive legal requirements. See also Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 at 1014 (2d Cir. 1973) (Medina, J.) (Rehearing and Rehearing en banc denied May 24, 1973). In the Enabling Act, Congress recognized the distinction between substantive law, which creates and defines the rights of litigants, and the procedural or adjective law, which prescribes the court practice, means or method for administering the substantive law. Occidental Life Ins. Co. of California v. Kielhorn, 96 F.Supp. 288, 292-293 (W.D. Mich. S.D. 1951)

Despite this Congressional direction, repeated in the highest judicial pronouncements, that substantive law may not be changed in order to implement the procedural provisions of Rule 23, the District Court in its judgment and order willingly sacrificed substantive legal doctrine along with some of the most fundamental of rights of objectors and other Debenture owners who had not affirmatively consented to facilitate use of class action Rule 23 cunningly devised by the parties to the litigation and their counsel to achieve approval of the settlement and authorization of the merger. The simplistic conclusion "that the Rule 23 procedures were properly followed" (367a) and these "procedures have protected the substantive rights of the individual debenture holders" (367a) was the District Court's response to objectors' contentions that impairment and modification of both substantive principles and concepts as well as curtailment of substantive rights were effected by the settlement and merger.

Whether the federal securities laws proscribe "freeze-outs" of common stock and regulate fairness in parent-subsidiary mergers, as decided by this Court in Green v. Santa Fe, supra, now pending before the Supreme Court, is a critical issue involving modification of substantive rights.

So too whether buried provisions in Indian Head's 100-page Indenture sanctioned a court-approved class action settlement that authorized a merger under which the right to convert Debentures into common stock was altered, and in its

place substituted a right solely to convert into a fixed cash sum, over objections and without affirmative consent of each Debenture owner affected, is a critical issue involving abridgments of substantive rights.

This Court's decision in Van Gemert v. The Boeing Co., 520 F.2d 1373, 1383 (2d Cir. 1975), cert. denied 423 U.S. 947 (1975), was that a duty of reasonable notice existed, arising out of the contract between Boeing and the debenture holders, pursuant to which Boeing exercised its right to redeem the debentures. This duty to the convertible debenture holders was not met by putting such notice provisions in a 113-page Indenture. In the light of Boeing, although no notice appeared on the Indian Head Debentures that a merger could alter the conversion rights (201a-206a), but to the contrary the provisions printed thereon specified that no supplemental indenture shall alter or impair the right to convert into shares of common stock at the rates and upon the terms provided in the Indenture without the consent of the holder of each Debenture affected (201a-202a, 483a-484a), the Rules Enabling Act was directly offended by the stipulated use of the procedural device of Rule 23 as a method to secure court approval of a merger that impaired substantive conversion rights of the Debentures owned by holders who objected and did not consent.

Another naked abridgment and modification of substantive rights inherent in the court-approved settlement and merger (which also entailed breach of specifically required procedures under the Federal Rules) was the issuance, as part of the judgment,

of a permanent injunction against all class members from prosecuting any individual or class claims arising out of or relating to the matters set forth in the complaints of the settled actions, including any claim related to consummation of the merger, other than a proceeding for appraisal pursuant to Section 262 of the Delaware General Corporation Law (156a, 400a).

This permanent injunction was issued without prior adequate notice (See 185a-11-185a-30) The hearing on approval of the class action settlement and merger was not a trial on the merits, Neuwirth v. Allen, ['61-'64 Decisions] CCH Fed. Sec. L. Rep. ¶91,324 (S.D.N.Y. 1964), aff'd, 338 F.2d 2 (2d Cir. 1964); Saylor v. Lindsley, 456 F.2d 896, 904 (2d Cir. 1972); City of Detroit v. Grinnell Corporation, 495 F.2d 448, 456 (2d Cir. 1974), and a permanent injunction can properly be issued only after a right thereto has been established at a trial on the merits. 11 Wright and Miller, Federal Practice and Procedure §2941 at 361 (1973); Capital City Gas Company v. Phillips Petroleum Company, 373 F.2d 128, 131 (2d Cir. 1967). At the hearing on the settlement no evidence was introduced by proponents of the compromise to establish lack of adequacy of another remedy or any irreparable loss or damage necessary to support the grant of this permanent injunction. 7 Moore, Federal Practice ¶65.18 [3] at 65-135-140 (1975). (207a-273a). Even the Indenture pursuant to which the Debentures were issued specifically provided in Section 8.09:

"Anything in this Indenture to the contrary notwithstanding, the holder of any Debenture without reference to or the consent of either the Trustee or the holder of any other Debenture, in his own behalf and for his own benefit, may enforce, and may institute and maintain any proceedings suitable to enforce, his right to convert his Debenture into shares of Common Stock as provided in Article Five."
(537a)

Moreover the District Court in its order granting the permanent injunction set forth no reasons for its issuance^{11/} and described the acts restrained by reference to the complaints in the settled suits, in contravention of Federal Rule 65(d) which specifies the form and scope of every order granting an injunction in civil litigation in the federal courts. 11 Wright and Miller, supra, §2941, p.358 et seq. Even though Rule 65(d) provides that an injunction is binding only upon the parties to the action, this injunction order may be binding on objectors who, although not parties, as Debenture owners were unidentified but described members of the "Debenture Owner Class" within the definition of the settlement agreement, and had actual notice of the Court's order.

One of the most substantive rights of objectors thus abridged by the District Court's judgment was their right to petition for redress of grievances -- a right guaranteed by the First Amendment which objectors had exercised in a separate action filed prior to this order granting the permanent injunction (408a-409a). Additionally, the permanent injunction abridged

^{11/} Findings of fact and conclusions must be made on the issuance of a permanent injunction. Alberti v. Cruise, 383 F.2d 268 (4th Cir. 1967); Hook v. Hook & Ackerman, Inc., 213 F.2d 122 (3d Cir. 1954); Chas. Pfizer & Co. v. Zenith Labs, Inc., 339 F.2d 429 (3d Cir. 1964).

and deprived objectors in a Rule 23(e) proceeding of their rights to due process because it denied objectors' substantive rights to notice and to a hearing on the very subject of whether they were entitled to prosecute their own action on the merits of their own complaint.^{12/}

The Indian Head Debentures are each contracts with state-created rights, and for all purposes were made and are to be construed under the laws of the State of New York, as provided in Section 16.09 of the Indenture. (576a) Boeing, supra, 520 F.2d at 1382-3, n. 19. The Debentures enjoy creditor status and substantive state rights and protection, which, pursuant to Sec. 259 of the Delaware General Corporation Law, (Delaware being the state of incorporation of Indian Head), must be preserved and not impaired, in the event of a merger. See Kusner v. First Pennsylvania Corporation, 531 F.2d 1234, 1238 (3d Cir. 1976).

In Sibbach v. Wilson & Co., Inc., 312 U.S. 1 at 9-10 (1941), the Supreme Court stated:

"Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States; but it has never essayed to declare

^{12/} Concurrently, if Rule 23 is construed to have conferred power on a district court to issue permanent injunctions on the basis and in the manner ordered by the court below, then that in and of itself was an "enlargement" of a district court's jurisdiction over the subject matter in violation of the Enabling Act.

the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where a right or duty is imposed in a field committed to Congress by the Constitution. On the contrary it has enacted that the state law shall be the rule of decision in the federal courts."
(footnotes omitted)

Federal Rule 23 deals solely with the procedural means by which a class action can be maintained, prosecuted or compromised. Despite the broad discretion conferred on a district court under this rule, its use may not be subverted to impair state interests or substantive rights granted by state statutes or contracts in any way.

Thus, far from Rule 23 procedures having protected the substantive rights of the individual Debenture holders, as the District Court concluded (367a), in this case these procedures have been distorted into an instrument of wrong which worked oppressive harm upon the substantive rights of objectors and other Debenture owners who did not affirmatively consent to the settlement and merger.

II. CONSTITUTIONAL OBJECTIONS TO THE CLASS ACTION SETTLEMENT AND MERGER

If Rule 23 is so construed and applied as to authorize the judgment and order entered by the District Court approving the class action settlement and merger, then objectors submit that it is constitutionally objectionable as a denial of due process, as directing impairment of the obligation of contracts, and as a denial of the right to petition for redress of grievances.

The "touchstone of due process" in a class action to satisfy Rule 23 is both adequacy of representation and adequacy of notice. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176-177 (1974).

This Court has stated that "as a result of the sweeping changes in Rule 23 (made by the 1966 revisions), a court must now carefully scrutinize the adequacy of representation in all class actions." Eisen II, 391 F.2d 555 at 562 (2d Cir. 1968). Accord: Gonzales v. Cassidy, 474 F.2d 67, 74-75 (5th Cir. 1973) ("a court . . . must stringently apply the requirement of adequate representation"). Strict compliance with Rule 23(a)(4) is, therefore, inextricably intertwined with due process requirements.

Long before the complete revision in 1966 of Federal Rule 23, the Supreme Court in Hansberry v. Lee, 311 U.S. 32 (1940), held that adequacy of representation is a crucial due process consideration, and a failure of due process exists in those cases where it cannot be said that the procedure adopted fairly

insures the protection of the interests of absent parties who are bound by the judgment in the class action. Hansberry stands for the principle that the absence of antagonism is necessary to establish adequacy of representation. On that subject, Chief Justice Stone stated: (at p.44-45)

"It is one thing to say that some members of a class may represent other members in a litigation when the sole and common interest of the class in the litigation is either to assert a common right or to challenge an asserted obligation. It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class so that any group merely because it is of the class so constituted, may be deemed adequately to represent any other of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." (citations omitted)

Hansberry is a case where the action was based on an agreement which "did not purport to create a joint obligation or liability." 311 U.S. at 44.

The promise of Indian Head and its obligations, as expressed in the Debentures and in the Indenture, was that the Debenture holder would have the right to convert into shares of common stock at the rates (25.974 shares of common stock per \$1000 Debenture) and upon the terms provided in the Indenture without alteration or impairment, in the absence of the written consent of each holder of each Debenture affected. (202a, 483a-484a) This promise ran severally to each Debenture holder. (576a)

As a result, since objectors and other Debenture owners were and are free to assert their several rights and to challenge any attempt to alter, impair, modify, abridge, or take away such several rights, it cannot properly be said in this proceeding that the representatives of the "Debenture Owner Class" designated as such in the settlement and Court Order, dated August 2, 1976 (148a, 151a), were adequate representatives of that class who afforded the protection that due process requires.

A conflict in interest of the class representative which goes to the very subject matter of the litigation or heart of the controversy will defeat a party's claim to representative status under Rule 23(a)(4). 7 Wright & Miller, Federal Practice & Procedure §1768 at 639; 3B Moore, Federal Practice ¶23.07[3] (1976).

Objectors contend that there was in this case both a clear lack of adequate representation of the "Debenture Owner Class" to comply with due process, as well as a disregard of the standards of stringent scrutiny which must be applied before a judicial finding that the Rule 23(a)(4) prerequisite to a class action existed.

Just as in Hansberry, the substantial and several interests in this case of the Debenture Owner Class representatives who were proponents and affirmatively consented to the settlement and merger were not the same or even similar to those of objectors and those other Debenture owners who did not affirmatively consent, all of whom had individual and separate rights

based on their several Debenture contracts. In fact, by their multiple and divided loyalties to various groups, they were riddled with conflicts of interest and divided allegiance. Inadequate representation inexorably flows from such a situation.

The District Court, by its Order, dated August 2, 1976, determined that the actions shall be maintained as class actions, "for purposes of settlement only", after the terms of the settlement and merger had already been bargained with defendants by plaintiffs as undesignated "class representatives" and their counsel. (cf. 148a, 160a). This practice, condemned in the Manual for Complex Litigation (1975) Part I, §1.40, p. 25, denied to all unidentified but described members of the Debenture Owner Class the opportunity to show the inadequacy of the representation of the class by those pre-selected representatives who, with their counsel, agreed to the settlement and merger -- a merger that had been so stridently castigated and denounced less than five months before the adversaries had linked arms and agreed on total peace. See Manual, supra, at §1.46, p. 55. This course of action in and of itself casts the gravest doubts on whether the stringent scrutiny required for a Rule 23(a)(4) finding was ever given.

The District Court in its Memorandum adverted to City of Detroit v. Grinnell Corporation, 495 F.2d 448 at 466 (2d Cir. 1974), as sanction for the practice it utilized in this regard. (366a). However, examination of the Grinnell decision discloses a major basis of distinction. In discussing, but setting aside,

the dangers catalogued in the Manual that pervaded approval of a class action for purposes of settlement only, Judge Moore was at pains to state in his Grinnell opinion:

"There is no allegation that the settlement conflicted with or was adverse to any class members' interest. The major concern of the Manual For Complex Litigation's recommendation against approval of a viable class is absent in this case."
495 F.2d at 465

That the settlement and merger in the present case conflicted with and was adverse to the interests of objectors and other Debenture owners who did not affirmatively consent was advanced as a major item of objection to approval of the settlement and merger in the hearing before the District Court. (197a, 256a, Brief in Support of Objections to Proposed Settlement). However, this argument was given but short shrift in the opinion approving the settlement (370a), giving rise to the conclusion that the District Court merely paid lip-service to the required rigorous application of Rule 23(a)(4) in order to approve the class action settlement and merger.

On the subject of adequacy (in truth, inadequacy) of representation, it is quite significant that not one word appeared in either the Notice of Class Actions, Proposed Settlement and Hearing, (185a-11-185a-30), or the District Court's opinion, (352a - 392a), identifying the designated class representatives who, under Rule 23(a)(4), were required to be fair and adequate protectors of class interests. The reasons for this curious, if not bizarre, omission becomes apparent on examination of the Settlement Agreement (160a), its Amendment (186a), and

the Court Order, dated August 2, 1976 (148a). These documents do indeed disclose the names of the class representatives. (165a-166a; 188a; 151a). A further delving into the record documents supplies a plausible explanation for this omission because the true nature of the multiple and conflicting interests of these "representatives" is then unfolded.

(a) Edward Brucker and Daniel R. Kaplan were designated representatives of all classes (165a; 188a; 151a). Although these plaintiffs owned only \$11,000 principal amount of Debentures (14a; 46a-47a; 94a), they, nevertheless, became representatives and "fair and adequate protectors" of the interests of (i) the Common Stock Class, though they owned no Common Stock; of (ii) the Debenture Seller Classes, both Class A and Class B, though they never sold any Debentures; of (iii) the Warrant Owner Classes, both Class A and Class B, though they owned no warrants; and of (iv) the Warrant Seller Classes, both Class A and Class B, though they never sold any warrants.

(b) William B. Weinberger was designated the representative of the Debenture Owner Class and Debenture Seller Classes, both Class A and Class B (165a-188a; 151a). Yet Weinberger was not a member of the Debenture Owner Class and Weinberger was also not a member of the Debenture Seller Class A. Weinberger was, however, a member of Debenture Seller Class B, because he had owned \$15,000 Debentures on July 2, 1974 and had sold them on July 18 and 23, 1974, claiming a loss of \$213.43 by reason of being then deprived of his right to convert (see note 3 supra, p. 9).

(c) Norte & Co., owner of 32 shares of Common Stock, who had been added as a named plaintiff in the Brucker second amended complaint, filed with consent of the defendants on July 26, 1976 (84a, Defts. Consent to Amend Complaint, at 4a), six days after the settlement bargain of July 20, 1976 had been struck (160a), was designated the representative of the Common Stock Class. (165a-166a; 188a; 151a)

(d) Cecil G. Huskey, W. T. Stratton and Shamrock Corporation were designated the representatives of the Warrant Owner Classes, both Class A and Class B, and the Warrant Seller Classes, both Class A and Class B. (165a; 188a; 151a) Each of these representatives were members of the Warrant Owner Classes (94a; See note 3 supra, p. 9), but none were members of the Warrant Seller Classes. (94a)

Huskey and Stratton also had been added as named plaintiffs in the Brucker second amended complaint, filed July 26, 1976 (84a), six days after the settlement bargain had been struck in the Agreement of July 20, 1976. (160a) When Shamrock Corporation joined the Settlement Agreement by Amendment, dated July 28, 1976 (186a), it, too, became a designated representative of these Warrant Classes. (188a; 151a)

Implicit in the requirements of Rule 23(a)(4) is that the party seeking to represent the class himself be a member of that class. The rationale of this requirement is that it is unlikely that a non-member of the class will adequately defend the interests of that class. 7 Wright & Miller, Federal Practice

& Procedure §1761 at 585 (1972). The Supreme Court, in Bailey v. Patterson, 369 U.S. 31 at 32-33 (1962), noted that the representative must be a member of the class he seeks to represent, otherwise he lacks standing to assert the rights of class members. See also Hall v. Beals, 396 U.S. 45, 49 (1969); Long v. Robinson, 436 F.2d 1116 (4th Cir. 1971).

Implicit also, if not in reality explicit, in the requirements of Rule 23(a)(4) is that a representative cannot have interests which might be antagonistic to other members of that class. Such antagonism may arise as a result of differences over economic interests or individual predilections. The principal relief sought must not be repugnant to the interests of class members. If the relief or new status accruing to class members as a consequence of the representative's actions is not in the interests of class members, that, too, should constitute noncompliance with Rule 23(a)(4).

In the present case, the very fact that the representative is no longer interested in the economic viability of his investment and preferred to settle for damages should also be sufficient to destroy his representative status under a stringent construction and application of subsection (a)(4), since, from such a posture, a clear antagonism between class members as to the type of relief sought exists. The vigorous opposition of the class representatives' counsel to the objections raised to the settlement, which arose out of specific, fundamental contract rights of the Debentures, suggests strongly an incompatibility with the adequate representative requirement of Rule 23(a)(4),

particularly in light of the order determining the actions to be class actions, for purposes of settlement only.

An additional intertwining of cross-interests is revealed in the stipulated and court-approved designation of counsel for the classes.

(a) Austrian, Lance & Stewart, P.C. was designated lead counsel for all classes, although that firm initially, in the Brucker complaint and amended complaint, had represented only Debenture owners (7a, 39a), but, after the Settlement Agreement of July 20, 1976, in the second amended complaint, consented to by defendants and filed July 26, 1976, represented added plaintiffs who were both warrant owners and common stockholders. (84a at 94a) The Austrian firm had not previously represented the Debenture Seller Classes A and B or the Warrant Seller Classes A and B. (7a; 39a)

The multiple classes which lead counsel thus assumed to represent were fraught with both actual and potentially differing and conflicting interests which clearly impinged upon the standards of allegiance and undivided loyalty owed professionally and as fiduciary in a class action. See generally Canons 5 and 9, Code of Professional Responsibility; Current Problems in Federal Civil Practice (PLI, 1975) Ch.13, p.412; Cf. Alleghany Corporation v. Kirby, 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, C.J. dissenting), aff'd by equally divided court, 340 F.2d 311 (2d Cir.) (en banc), cert. granted 381 U.S. 933 (1965), cert. dismissed 384 U.S. 28 (1966).

(b) Weinstein & Levinson were designated co-counsel for the Debenture Owner Class and the Debenture Seller Classes A and B, although that firm, as attorneys for Weinberger, had not represented any members of the Debenture Owner Class or Debenture Seller Class A. (166a; 188a; 151a; see note 3, supra p. 9)

(c) Wolf, Haldenstein, Adler, Freeman, Herz & Frank, attorneys for Shamrock, were designated co-counsel for the Warrant Owner Classes A and B and the Warrant Seller Classes A and B, although that firm had not represented any member of the Warrant Seller Classes A and B (188a; 151a; see note 3, supra p. 9)

In this settlement, the responsibility for fair and adequate protection of the interests of all Debenture owners, as well as the members of other classes, was assumed by the heretofore active participants in this litigation, especially by counsel. In addition to the normal obligations as an officer of the Court, and as counsel to parties to the litigation, class action counsel possess, in a very real sense, fiduciary obligations to those both before and not before the Court. As was observed in Greenfield v. Villager Industries, Inc., 483 F.2d 824 at 832, n.9 (3d Cir. 1973):

"Experience teaches that it is counsel for the class and not the named parties, who direct and manage these actions. Every experienced federal judge knows that any statements to the contrary is sheer sophistry."

The astute, experienced counsel for the parties to this settlement and merger could not have failed to have recognized that a procedure such as the class action, which has a formidable, if not irretrievable effect on substantive rights, must comport with constitutional standards of due process which include adequate representation. Cf. Villager, supra, at 831. To permit by consent class representatives with conflicting interests and without claims of their own to represent a class -- to permit counsel to represent multiple groups with differing and conflicting interests that necessarily result in dividing their allegiances and loyalties flouts directly the fundamental constitutional standards with which the parties and their attorneys in this proceeding were duty bound to comply.

Because of the demonstrated inadequate representation under due process standards and those required by Rule 23(a)(4), the judgment approving the settlement and merger, it is submitted, is, therefore, void, and has no binding effect on objectors and other Debenture owners.^{13/}

If Rule 23 is construed and applied to authorize the judgment and order entered by the District Court approving the class action settlement and merger, the resulting alteration or

^{13/} Cf. Gonzales v. Cassidy, 474 F.2d 67, 73 n.11 (5th Cir. 1973), wherein it was noted that the question whether a representative party's conduct of a suit was such that due process would not be violated by giving res judicata effect to the judgment in that suit "necessarily requires a hindsight approach to the issue of adequate representation."

impairment of the conversion rights of objectors' Debentures and those of other Debenture owners who did not affirmatively consent directly offends Article I, Section 10 of the Constitution. Section 253 of the Delaware General Corporation Law by such construction and application would be distorted into a law that impairs the obligations of the Debenture contracts, and derogates and erodes from those contracts substantial contract rights. Cf. Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398 at 431 (1934). The legislature of the State of Delaware never intended or authorized such an application of that statutory provision, as Section 259 of the Delaware General Corporation Law demonstrates, nor may the utilization of Federal Rule 23 constitutionally be construed to authorize such a result.

In treating Issue I of this Argument, supra, p. 21-22, there was discussed in the context of a violation of the Rules Enabling Act the permanent injunction in the District Court's judgment which abridged objectors' substantive rights to prosecute their own action on the merits of their own complaint. Not only was such injunctive order by the District Court prohibited by that Congressional mandate, but if Rule 23 is so construed and applied as to authorize such action, Rule 23 clearly has been transformed into an unconstitutional device to frustrate and stifle the right to petition for redress of grievances under the First Amendment. This proposition needs no further gloss.

III. THE NOTICE OF HEARING WAS INADEQUATE AND FAILED TO DISCLOSE MATERIAL FACTS

The matter of adequate notice, as a fundamental requisite of procedural due process, has for the most part been litigated in the context that individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort. Eisen IV, supra, 417 U.S. at 173-175.

In only a few cases has the subject of the adequacy of the content of the notice been considered. E.g. see Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 323 F.Supp. 364 (E.D.Pa. 1970); White v. Auerbach, 67 Civ. 99 (S.D.N.Y. filed Feb. 11, 1972); Cannon v. Texas Gulf Sulphur Company, 55 F.R.D. 308, 313 n.2 (S.D.N.Y. 1972). Such cases have uniformly held that the function of the content of the notice is to describe the settlement in neutral and impartial terms. The Manual For Complex Litigation, supra, §1.45 at 43 states:

"It is the court's responsibility to see that accuracy and impartiality are preserved in the substance of statements sent to class members."

Despite these expressions indicating the standards for the contents of the notice to be one of neutrality, objectivity and even-handedness, the notice in this case went so far as to highlight "Plaintiffs' Counsel's Recommendation of Settlement," which can scarcely be classed as neutral. (185a-22-23)

The Third Circuit, in Villager, supra, 483 F.2d at 834, pointed out that the failure of a class action notice of

settlement to convey meaningful and required information may be fatal to due process.

Here objectors contend that just as important, if not more so, than what the notice stated, was what the notice failed and omitted to state. These omissions were of material facts under any standard of materiality, all of which would have assumed actual significance in the deliberations of a reasonable Debenture owner in determining as a class member his choice of action in the transaction.

The notice of settlement required a securities investment decision by the members of the Debenture Owner Class. Therefore, the standards of materiality announced in securities cases reasonably should be deemed to govern as to what should have been included in the contents of the notice, but was not. These standards have been repeatedly set forth. See e.g. List v. Fashion Park, Inc., 340 F.2d 457, 462 (2d Cir. 1965), cert. denied sub nom. List v. Lerner, 382 U.S. 811 (1965); Symington Wayne Corp. v. Dresser Industries, Inc., 383 F.2d 840, 843 (2d Cir. 1967); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), cert. denied 394 U.S. 976 (1969); Affiliated Ute v. United States, 406 U.S. 128, 153-54 (1972); Broder v. Dane, 384 F.Supp. 1312, 1321 (S.D.N.Y. 1974); TSC Industries, Inc. v. Northway, Inc., __ U.S. __, 96 S.Ct. 2126, 2133 (1976).

The following are most meaningful and material omissions in the notice:

1. No disclosure was made that both the Debentures and Indenture contained provisions prohibiting alteration or impairment of conversion rights without affirmative consent of each Debenture owner affected.

2. No disclosure was made of the identities and multiple interests of the designated representatives of the class.

3. No disclosure was made of the multiple and differing interests of the designated lead counsel and co-counsel for the classes.

4. No disclosure was made of all of the terms of the proposed settlement and merger.

5. No disclosure was made of the terms of the prior proposed merger announced February 11, 1976, but withdrawn on March 4, 1976, to enable a fair comparison of what had been accomplished by the settlement. (58a-59a)

6. No disclosure was made as to the reason why a Debenture owner who submitted his Debentures for purchase pursuant to the settlement would receive \$844.16 in payment for each \$1000 Debenture (or at the rate of \$32.50 per share of common stock for 25.974 shares) (162a), while a Debenture owner who did not so tender,

upon consummation of the merger, thereafter would only be entitled to receive \$831.17 (or at the rate of \$32 per share of common stock) upon surrender for conversion of each Debenture. (188a-28-29)

7. No disclosure was made that any unidentified but described class member who appeared and objected would, if his objections were overruled, be subjected to a permanent injunction preventing any independent action on his part, which, even if questionable, put him at risk if he acted.

8. No disclosure was made that any unidentified but described class member who elected to file his own action, was stayed and enjoined from suing in any other court except in the Court below. (156a-157a)

These material non-disclosures constitute the notice inadequate as a matter of law, mandating, it is submitted, reversal of the judgment and order of approval.

IV. THE JUDGMENT THAT THE MERGER PROVISION IN THE INDENTURE PERMITS ALTERATION OF CONVERSION RIGHTS WITHOUT CONSENT OF EACH DEBENTURE OWNER WAS ERRONEOUS.

The District Court upheld the provision in the settlement agreement allowing for conversion of the debentures into cash only, without the written consent of each debenture holder when conversion rights are altered pursuant to a merger, by hinging its conclusion on Section 5.06 in the Indenture. (514a-515a). The pertinent portions of Section 5.06 provide that:

"In case of any . . . merger of the Company into another corporation . . . such successor . . . shall execute and deliver to the Trustee a supplemental indenture . . . providing that the holder of each Debenture then outstanding shall have the right thereafter to convert such debenture into the kind and amount of shares of stock and other securities and property receivable upon such . . . merger . . . by a holder of the number of shares of common stock of the Company immediately prior to such . . . merger"

The Court's syllogistic interpretation of this was:

1. Section 5.06 should control because it contains a detailed and specific provision as to what the Debenture holders' rights are in a merger. (369a)

2. In the case of a merger, Section 5.06 requires that the supplemental indenture contain the right to convert into whatever form of property the shareholders receive in the merger. Thus, the Debenture holders have never had an absolute right to convert into Indian Head common stock in a merger, but only into whatever form of "property" the shareholders would receive. (369a-370a)

3. Cash is "property" within the meaning and scope of that term in Section 5.06. (370a)

4. Thus the provision in the settlement agreement allowing for conversion of the Debentures into cash only is proper under Section 5.06 because this is all the shareholders are receiving. (370a)

5. Section 5.06 does not require the individual written consent of each Debenture holder when conversion rights are allowed pursuant to a merger (370a)

6. Therefore the settlement abridges no rights of the Debenture holders and can properly bind all Debenture holders who do not opt out. (370a)

7. The Debenture holders were alerted to the application of the merger sections of the Indenture by the Debenture itself, which states that "....the holder....has the right.... to convert this Debenture into fully paid and non-assessable shares of common stock of the Company....subject to such adjustment, if any, of the conversion rate and the securities or other property issuable upon conversion as may be required by the provisions of the indenture....". (369a)

This seemingly inescapable "logic of words should (and indeed must) yield to the logic of realities"^{14/} and "the applicable standards of right conduct."^{15/}

^{14/} Brandeis, J. in Di Santo v. Pennsylvania, 273 U.S. 34, 43 (1927)

^{15/} Cardozo, The Nature of Judicial Process, (Yale U., 1921) p. 112.

The realities of this case and the rationale of this Court in Boeing, supra, in conjunction with the fundamental concepts of the law pertaining to corporate fiduciary and contractual obligations, the supremacy of substance over form, along with the basic motivation for convertible debenture purchases, all join to controvert the District Court's views on this subject.

The District Court misread or was misled by the terms of the Debentures in concluding that those terms "alerted" the Debenture holders to the applicability of the merger sections of the Indenture. (369a). The clause on the Debenture adverted to by the Court refers to the sections of the Indenture that pertain to adjustment of the conversion rate and the securities or other property issuable upon conversion as may be required by the provisions of the Indenture. (482a). The Table of Contents of the Indenture (which while not constituting part of the Indenture or having any bearing upon the interpretation of any of its terms and provisions (469a)) is nevertheless a ready reference source to the contents of this 100-page document. As shown by this Table (471a-472a), Article Five, Sections 5.03 and 5.04 of the Indenture pertain to provisions having to do with non-adjustment or adjustment of the conversion rate and the securities or other property issuable upon conversion. (510a-514a). Not a word is stated in the Debenture itself, or in those adjustment provisions, concerning merger. The very merger provision in Section 5.06 that the District Court relied on for its "alerting" conclusion (369a), included the statement that:

"Such supplemental indenture shall provide for adjustments which shall be as nearly equivalent as may be practicable to the adjustments provided for in this Article Five." (384a, 514a)

These adjustments refer to adjustments required by stock dividends, subdivision or combination of shares, issuance of rights or warrants to purchase shares at less than market price, distribution of indebtedness and certain assets and rights, rights to receive shares other than common stock, and cash for fractional shares. (510a-514a)

On the other hand, stated in the terms of the Debenture is the provision that:

"....no....supplemental indenture shall.... alter or impair the right to convert the same into shares of common stock at the rates and upon the terms provided in the indenture, without the consent of the holder of each Debenture affected....". (202a; 389a; 484a)

This aspect of the case is closely analogous to that involved in Boeing. In Boeing, the buried provision in the 113-page indenture involved the notice which would be provided to convertible debenture holders, upon exercise by Boeing of its right to redeem the debentures. Putting the notice provisions only in the 113-page indenture was held to be "effectively no notice at all." Boeing, supra, 520 F.2d at 1353. Here the buried provision in the 100-page Indenture, according to the District Court's interpretation, permitted alteration of the right to convert the debentures, in the event of a merger, only into whatever form of "property" the shareholder would receive, and without the consent of the Debenture owner affected. (369a-

370a) Since the merger devised in the settlement only provided Indian Head shareholders with \$32.00 per share in cash, the Debenture owners only had the right to receive that fixed equivalent cash sum, or opt out. But this simply gives to Debenture owners a Hobson's choice, which effectively is no choice at all. (Cf. 64a)

The effect of this interpretation is practically to sanction a continued deception of all purchasers of Indian Head Debentures from the time of their issuance. If the facts were such that had they been revealed, the Debenture owner's conversion right was at the will of the corporation or its control capable of being altered so that the normal expectation for market price growth of the Debenture could be foreclosed and impaired without his consent, then the Debenture purchaser who accepted, because of the conversion right, a lower interest rate on his security may well have been defrauded of the interest differential. See Kusner v. First Pennsylvania Corporation, 531 F.2d 1234 at 1238 (3rd Cir. 1976).

Other contentions to controvert the District Court's interpretation are:

1. The Debenture contracts of objectors and other owners who did not consent to the settlement and merger were breached by the alteration of the conversion rights.

2. The unconscionable merger provisions of the Indenture are unenforceable as a matter of public policy because the Indenture is a contract of adhesion. Boeing, supra, 520 F.2d at 1380.

3. The "merger" is simply a procedural sham that may not be used to impair the Debenture owner's rights without his consent, under Sec. 259 of the Delaware General Corporation Law.

4. Under Green v. Santa Fe, supra, the merger is proscribed by the federal securities laws and the common law fairness requirements for parent-subsidary mergers.

V. THE PERMANENT INJUNCTION ISSUED AGAINST ALL CLASS MEMBERS AS PART OF THE JUDGMENT APPROVING THE SETTLEMENT WAS IMPROPER.

The clash with the Enabling Act and objectors' constitutional rights of the permanent injunction issued by the District court in its judgment and order entered November 19, 1976 (393a at 400a) against all class members from prosecuting any individual or class claims arising out of or relating to the matters set forth in the complaints of the settled suits was discussed supra at p. 21-24, and 37.

Little else need be added to the points which mandate the impropriety of this permanent injunction. The Advisory Committee for the 1966 revision of Rule 23 plainly contemplated that members of a class would have a right to collaterally attack the judgment which purports to bind them. Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39, 45 (1967). Moreover, the Advisory Committee was careful to note that nothing in the Rule disturbs the general principle that the res judicata effect can be determined only in a subsequent action. Advisory Committee's Note, 39 F.R.D. 98, 106 (1966), citing Restatement of Judgments, §86, comment h, §116 (1942).

Despite this, the District Court, which conducted the class action settlement, at the behest of the settling parties and their counsel, went far beyond a mere predetermination of the res judicata effect of its own judgment by issuing the permanent injunction complained of. When objectors sought by their Motion to Alter or Amend Judgment and Order (402a) to dissolve this permanent injunction, the Court at the hearing thereon held November 29, 1976 (434a) indicated by his questions that as a "practical matter" there was no difference between a "bar order" under Rule 23(c) and a permanent injunction. (439a) In denying this Motion (412a), the Court orally stated that:

"The fact that a permanent injunction was in the offing here, of course, has been a matter of record since the notice was sent out pursuant to the order of August 2; and in any event, it seems to me that my opinion sets forth my reasoning, my findings, my conclusions."
(461a)

Notwithstanding this expression, the facts are that nothing was stated in the notice mailed to Debenture owners concerning a permanent injunction or that "a permanent injunction was in the offing". Nor is there any reasoning, findings, or conclusions in the Court's opinion that support the issuance of a permanent injunction. (352a-393a) The only "matter or record" concerning a permanent injunction "in the offing" is a paragraph contained in the Stipulation and Agreement of Settlement, dated July 20, 1976, Paragraph 6(g), which specifies that if the settlement is approved, a judgment and order will be issued which includes the permanent injunction. (160a at 181a) The sole methods by which knowledge of the possibility of a permanent

injunction could be obtained were to examine the documents on file with the Clerk or obtain a copy of the Settlement Agreement or raise a question concerning this with lead counsel for plaintiffs. (185a-11-185a-30, particularly Par. 6)

Such a state of affairs can scarcely be held to comport with the adequate notice required for a permanent injunction. The other procedural and substantive improprieties tainting the permanent injunction with clear error have been previously mentioned, including:

1. The hearing on approval of the class action settlement was not a trial on the merits without which a permanent injunction cannot properly be issued. (supra, at p. 22).

2. No evidence was produced by proponents of the settlement to establish the requirements of lack of adequacy of another remedy or irreparable loss or damage to support the grant of a permanent injunction. (supra, at p. 22).

3. The Indenture in Section 8.09 specifically conferred by contract the right to maintain any proceedings suitable to enforce a Debenture owner's right to convert his shares of common stock. (supra, at p. 22-23).

4. Finally, the requirements of Rule 65(d) for injunctions were disregarded. (supra, at p. 23).

VI. THE CLASS ACTION SETTLEMENT AND MERGER
WAS REplete WITH VIOLATIONS OF LAW.

The class action settlement and merger approved by the judgment and order of the District Court involved, objectors contend, violations and failures to comply with applicable decisional law of this Circuit, various provisions of the federal securities laws and rules of the Securities and Exchange Commission, and applicable state statutes and common law.

A. Violations of Applicable Decisional
Law of this Circuit.

Green v. Santa Fe Industries, Inc., supra, still remains the law of this Circuit in its holding that the federal securities laws proscribe "freeze-outs" of common stock and regulate fairness in parent-subsidary mergers. Notwithstanding the suggestion that Merrit v. Libby, McNeill & Libby, 533 F.2d 1310 (2d Cir. 1976), may erode the holding in Green, or that "the Indian Head merger is distinguishable on its facts from each of the above cases" (364a), the record in this case can scarcely support what this Court found in Libby, namely, that the Thyssen companies "put out tender offers that disclosed their ultimate goal." Libby, at 1314. Moreover, there simply is no doubt that the shell corporation, TBH, was created in this case as a conduit for a forced merger. (185a-11 at Par. 4; 185a-36-39; 424a) There likewise is no doubt that the consummation of the settlement and merger lacks any justifiable corporate purpose of Indian Head for the "freeze-out." Green, supra, 533 F. 2d at 1286.

The breach of duty to objectors and other Debenture owners who did not consent to the settlement and merger is even more fundamental in this case than the merger squeeze-out in Green, because here not stockholders, but creditors, are involved whose rights are grounded on an obligation and faith of a contract that may not be interdicted or impaired by a state statute. Delaware, the very state whose statute is relied on to effect the merger, has decreed in Sec. 259 of its General Corporation Law that all creditors' rights must be preserved and remain unimpaired in such event.

The Boeing case, and the conclusions flowing from it, also represent the decisional law of this Circuit. The District Court simply mentioned that whether or not under that holding Indian Head was obligated to send notice of the two tender offers to the Debenture owners (364a-365a) was an issue in the settled actions. Omitted, however, was whether Boeing mandated the inapplicability of the buried merger provision of Section 5.06, which was a pivotal hinge upon which the entire settlement and merger was structured.

B. Violations of the Federal Securities
Laws and Rules of the Securities
and Exchange Commission 16/

Objectors in contesting the settlement contended that the Settlement Agreement and Notice of Hearing involved violations of various federal securities law provisions and rules of the

16/ The texts of the various federal securities laws considered herein appear in the Addendum to this brief.

Securities and Exchange Commission. These contentions may be summarized as follows:

1. The settlement and notice involved an "offer to sell" as well as "an offer to buy" securities, within the context of Section 5(c) of the Securities Act of 1933 (15 U.S.C. §77(e)(c)), without a registration having been filed as to such securities.

The existence of an "offer to sell" is derived from the fact that the alteration or modification of a material substantive right of the Debenture contract, substituting a fixed cash sum in place of the right to convert into common stock, is, in economic reality, an offer of exchange of one security with certain rights, powers and privileges for another with materially different rights, powers and privileges. Ingenito v. Bermec Corporation, 376 F.Supp. 1154 at 1178-1181 (S.D.N.Y. 1974); SEC v. Associated Gas and Electric Co., 24 F.Supp. 899 (S.D.N.Y. 1938), aff'd 99 F.2d 795 (2d Cir. 1938); H.L. Green Co., Inc. v. Childree, 185 F.Supp. 95 (S.D.N.Y. 1960).

The "offer to buy"^{17/} may likewise be derived from the references in the Notice that a member of the Debenture Owner Class upon submission of his Debenture certificate, together with a transmittal letter, will be paid \$844.16 for each \$1000 Debenture. (185a-11, Par. 2 and 21)

The mails were used in connection with such offers to sell and offers to buy. The notice was a prospectus within the definition of Section 2(10) of the Securities Act of 1933.

^{17/} The "offer to buy" was not by the issuer, Indian Head, but by TBI, its controlling person. (185a-11, Par. 5)

No current registration statement was filed with respect to the Debentures to be altered or modified by the merger.

To the objection that the Settlement Agreement and Notice involved an "offer to sell," the District Court simply stated that it was not, but in any event if it were because of the material modifications of the Debentures, Section 3(a)(10) of the 1933 Act would apply "to exempt the transaction."

(372a-373a) In this connection, it may be noted, that Section 3(a)(10) technically does not exempt "transactions," but only "securities." Technically also, this section does not exempt an "offer to sell," but only a security which is actually issued. In addition, by the plain wording of the statute, the fairness hearing provided for in Section 3(a)(10) must take place before the offer to sell is made, not after.

Assuming, arguendo, either the transaction or the offer to sell securities, or the securities involved in the settlement may interpretively fall within the exemption afforded by Section 3(a)(10), the burden of establishing the availability of such exemption is upon the one who relies upon it. SEC v. Ralston Purina Co., 346 U.S. 119, 124 (1953); SEC v. Culpepper, 270 F. 2d 241 (2d Cir. 1959); cert. denied 361 U.S. 896 (1959). The colloquy of counsel cannot take the place of evidence. Upson v. Otis, 155 F. 2d 606, 614 (2d Cir 1946); Cohen v. Young 127 F. 2d 721, 725-26 (6th Cir. 1942). The proponents of the compromise did not meet their burden of establishing this exemption in the hearings of October 13 and 18, 1976. (207a, 273a)

2. All of this Section 5(c) argumentation falls by the wayside if it be found that the notice of the hearing was within the proscriptions of Section 17 (a) of the 1933 Act because of the material omissions, which objectors have catalogued, supra, at p.39-41. Under Section 17(c) of the Act, the exemptions provided in Section 3 do not apply. At that juncture the objection that Section 17(a) was offended takes on the cast of an application for injunctive relief. See Fischman v. Raytheon Mfg. Corp., 188 F. 2d 783, 787 (2d Cir. 1951); SEC v. Texas Gulf Sulphur Co., 401 F. 2d 833, 867 (2d Cir. 1968) (opinion of Friendly, J. concurring), cert. denied, 394 U.S. 976 (1969); 3 Loss, SECURITIES REGULATION 1785 (1961); cf. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 733-734 n. 6 (1975), and SEC v. Universal Major Industries Corp., [Current] CCH Fed. Sec. L. Rep. ¶95,804 at 90,916 (2d Cir. Dec. 16, 1976) (scope of injunctive relief for Section 5 violations).

3. The proposed exchange of the modified Debentures set forth in the notice was an offer of Debentures to be issued under an Indenture for which an application for qualification with the Securities and Exchange Commission was not effective. Therefore, Section 306(a)(1) of the Trust Indenture Act of 1939 was likewise infringed. In Morris v. Cantor, 390 F. Supp. 817 (S.D.N.Y. 1975), it was held that a private right of action may be maintained for a violation of the Trust Indenture Act of 1939. Injunctive relief is likewise appropriate for violations of this statute.

4. Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 likewise are charged to have been violated by the settlement and merger. On this aspect, since the approved merger is like that condemned in Green, injunctive relief under Section 10(b) and Rule 10b-5 is also appropriate.

SEC v. National Securities, Inc., 393 U.S. 453 at 465-468 (1969), SEC v. Capital Gains Research Bureau, 375 U.S. 180 (1963) and Mutual Shares Corp. v. Genesco, Inc., 384 F. 2d 540 (2d Cir. 1967) are supportive of the standing of objectors as private litigants to seek equitable relief from the Rule 10b-5 violations which are asserted to be inherent in the settlement and merger.

5. The Williams Act sections of the Securities Exchange Act of 1934 and the rules and regulations of the Securities and Exchange Commission promulgated thereunder were also violated by the terms of the settlement and merger and notice thereof. The statutory sections involved are: Sections 13(d)(1), 13(e)(1), 14(d)(1), 14(d)(4), and 14(e) of the Securities Exchange Act of 1934 (15 U.S.C. §§78m(d)(1), 78m(e)(1), 78n(d)(1), 78n(d)(4), and 78n(e)). This objection is that the notice constituted a "tender offer" and as such, the filing requirements of the Act were not complied with. Moreover, the material omissions from the notice made the offer misleading.

The District Court rejected this argument on this basis:

"While the settlement agreement does contemplate what might technically be described as a tender offer, we think that these sections were not meant to apply to judicially approved settlement agreements, particularly in light of the legislative history." (footnote omitted) (374a)

The Court further concluded:

"We find that the individual investors have been more than adequately protected by the procedures followed in the instant judicially-approved settlement, where the individual investor has had full notification of the terms of the offer, the people or groups involved, the purpose of the offer and the plans of the offeror." (375a-376a)

Notwithstanding this opinion, a review of the legislative history of the Williams Act does not disclose that "judicially approved settlement agreements" were exempted from the requirements of the statute and rules thereunder issued by the Securities and Exchange Commission. ^{18/}

The term "tender offer" has purposely not been defined. The Commission as recently as August 2, 1976 in Release No. 12676, Securities Exchange Act of 1934, specifically expressed the following view:

"In light of the record of the Tender Offer Hearings the Commission's position at this time is that a definition of the term 'tender offer' is neither appropriate nor necessary. This position is premised on the dynamic nature of these transactions and the need of the Commission to remain flexible in determining what types of transactions, either present or yet to be devised, are or should be encompassed by the term. Therefore, the Commission specifically declines to propose a definition of the term 'tender offer'."

^{18/} For the legislative history, see Senate Hearings on S.510, 90th Cong. 1st Sess. (1967); Hearings on H.R. 14475, S. 510, 90th Cong. 2d Sess. (1968); S. Rep. No. 550, 90th Cong., 1st Sess. (1967); H. R. Rep. No. 1711, 90th Cong., 2d Sess. 2811 (1968).

If, as objectors contend, the entire settlement and merger as well as the proceeding for its approval were tainted with violations of the Enabling Act, violations of constitutional rights, distortion of the procedural device of Rule 23, inadequacy of representation, inadequacy of notice, and departures from decisional law and federal and state statutory and common law, the individual investors have in fact not been protected in the judicially-approved settlement. The individual investor has not had adequate disclosure of all material facts for an informed investment decision. The individual investor has not had "full notification" of "the people or groups involved." The designated class representatives and their cross-interests were not made known in the notice. Identities of all the plaintiffs and defendants were not disclosed. The true purpose of the offer was not set forth, nor were the plans of the offeror. -- In this posture, a judicial exemption from the tender offer provision of the Williams Act is not justifiable. Nor was the burden of establishing the right to such a putative judicial exemption ever met by the advocates of the settlement and merger.

C. Violations of Applicable State
Statutes and Common Law

Sec. 259 of the Delaware General Corporation Law ^{19/} specifically provides that a creditor of a constituent corporation which has been merged under the laws of Delaware becomes a creditor of the corporation into which it has been merged, with ^{19/} The text of Sec. 259 of the Delaware General Corporation Law appears in the Addendum to this brief.

all rights preserved unimpaired, and all liabilities and duties of the merged constituent corporation become attached to the surviving or resulting corporation. In addition, such liabilities and obligations may be enforced against the surviving or resulting corporation to the same extent as if the liabilities had been incurred or contracted by the surviving or resulting corporation.

Thus, the creditors of a merged constituent corporation under Delaware law are automatically protected. See Folk, The Delaware General Corporation Law -- A Commentary And Analysis (Little, Brown 1972), Section 259/365-368.

As a result, the settlement and consummation of the merger with its concomitant alteration and impairment of the conversion rights of the Debentures infringes this Delaware statutory provision, as respects objectors and other Debenture owners who did not affirmatively consent.

The settlement and merger also ran afoul of The Pennsylvania Securities Act of 1972, 70 P.S. §1-101 et seq., as respects objectors and other Debenture owners who did not consent, who were residents of Pennsylvania.^{20/} Section 702 of the Act, 70 P.S. §1-702, which defines the scope makes applicable in subparagraphs (a) and (b) thereof, this statute to the settlement. Sections 401 and 703(a), 70 P.S. §§1-401, 1-703(a) of this Pennsylvania statute in effect combine the provisions of Sec. 17(a) of the Securities Act of 1933, Sec. 10(b) and Rule 10b-5, and Sec. 14(e) of the Securities Exchange Act of 1934.

^{20/} The text of the various applicable provisions of The Pennsylvania Securities Act of 1972 are set forth in the Addendum to this brief.

The enforcement provisions of this statute for a violation of the prohibited practices proscribed therein are, for all practical purposes, in pari materia with the 1933 and 1934 federal securities laws.

Because of the failure of the parties to the settlement to take into account this Act in connection with the mailing of the notice of the settlement to Debenture owners in Pennsylvania or to secure an exemption therefrom, the very direction of such notice, which embraces both an offer to buy and an offer to sell securities to Pennsylvania residents, was a violation of this statute.

D. The Settlement and Merger Effects Breach of the Debenture Contract under New York Law and is an Illegal Bargain

Article Sixteen, Section 16.09 of the Indenture specifies the contractual status of each Debenture and the Indenture under the laws of New York. (576a) See Boeing, supra, 520 F. 2d 1373 at 1382-3, n. 19.

Judge Oakes said in Boeing at p. 1385:

"What one buys when purchasing a convertible debenture in addition to the debt obligation of the company incurred thereby is principally the expectation that the stock will increase sufficiently in value that the conversion right will make the debenture worth more than the debt."

This Court held that "[t]he debenture holder relies on the opportunity to make a proper conversion on due notice. Any loss occurring to him from failure to convert... is not from a risk inherent in his investment but rather from

unsatisfactory notification procedures." (Id. at 1385)

The Court went on to state: (at 1385)

"The debenture holder's expectancy is that he will receive reasonable notice and it is his reliance on this expectancy that the courts will protect. See generally Fuller & Perdue, The Reliance Interest in Contract Damages, 46 Yale L.J. 52,373 (1936-37). See, e.g., Associated Perfumers, Inc. v. Andelman, 316 Mass. 176, 55 N.E. 2d 209 (1944). See also Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, (2d Cir. 1974), cert. denied, 421 U.S. 976, 95 S.Ct. 1976, 44 L.Ed. 2d 467 (1975)."

The present case is even more demanding of judicial protection. The Indian Head Debenture owners did not have merely a principal expectancy which entitled them to protection. They had a contract right and covenant that their rights to convert stock shall not be altered or impaired without their individual and several consent. In this respect, just as Judge Oakes stated, the Indian Head Debenture owners "are in a very real sense creditor beneficiaries, see 1 Restatement of Contracts, §136 (1932), to whom an underlying duty of fair treatment is owed by the corporation or majority stockholders or controlling directors and officers thereof." (Boeing, supra, at 1383, n. 19)

Not only does approval of the settlement and consummation of the merger accord unfair treatment to objectors and other Debenture owners who did not affirmatively consent, it effects a flat breach of their contracts.

Any bargain is illegal if either the formation or the performance thereof is prohibited by constitution or statute. Restatement of Contracts, §580(1) (1932). In addition, a bargain requiring a breach of contract with a third person is likewise

illegal, as is a bargain in violation of a fiduciary duty.

Restatement of Contracts §576, §569 (1932).

E. The Settlement was Unfair and Inequitable

In the February, 1976 proposed merger, the offer was to pay \$779.22 in cash for each \$1000 Convertible Debenture or at the rate of \$30 per share of Common Stock times the 25.974 share conversion ratio. (58a-59a)

This proposal was strongly castigated in the amended verified complaint, particularly in the Second Claim, Paragraphs Twenty-Seventh to Fortieth. (62a-66a) Paragraph Thirty-Fourth of that complaint charged:

"The merger offer to pay far less than the reduced [sic redemption] price, or keep the DEBENTURES without conversion, is a Hobson's choice under which the Owners would be forced either to give up their redemption right to \$1,030.30, or to surrender forever the conversion right which Indian Head guaranteed, not only for itself, but for any successor." (64a)

Under the settlement and merger agreed to and approved, however, the magic of an additional \$64.94 per Debenture or \$928,187.42 for all 14,293 Debentures, assuming none tendered until after the settlement became effective and merger consummated, has transformed a merger plan which, under Paragraph Thirty-First of the second amended Brucker complaint (117a), "had no business purpose, was designed to and had the effect of permitting TBI to acquire the . . . DEBENTURES . . . at a discount price in derogation of the rights and interests of all owners. . .," and which, (under Paragraph Thirty-Second of the second amended Brucker complaint (117a)), "was a manipulative

and deceptive device in breach of the federal securities laws", into a fair, reasonable and adequate settlement, which "counsel for the plaintiffs have concluded...would be in the best interests of plaintiffs and the classes..." (185a-22-23)

This magical transposition and sudden recognition by plaintiffs' counsel of "questionable" liability of the defendants may have been in some part induced by the "not more than \$600,000" TBI agreed to pay as "reasonable fees and expenses of counsel (185a-11, Par. 6), the "juicy bird in the hand" of "high six figures" to which Judge Friendly adverted in Alleghany Corporation v. Kirby, supra, 333 F. 2d at 347. In addition, this turnabout may have been prompted by the weariness or willingness of Brucker and Kaplan to accept \$9,285.76 for their \$11,000 of Convertible Debentures and have done with the matter. No matter, however, the reasons that brought about this change in position. While plaintiffs and their counsel are free to barter away their own rights, as was stated in Guttmann v. Braemer, 51 F.R.D. 537, 540 (S.D.N.Y. 1970), they should not be permitted to barter away the rights of other Debenture owners who did not affirmatively consent or who prefer an entirely different type of relief from that which was bargained.

The July, 1976 settlement, compared to the aborted proposal of February, 1976, has no relation to the economic facts relevant to the litigation. The significant dearth of adequate discovery conducted on an adversary basis by lead counsel and co-counsel designated as representing the class of Debenture owners inevitably intensifies the conclusion that the settlement is unfair and

inequitable.

The sum total of all these objections is that the class action settlement and merger was replete with violations of law.

VII. THE UNDERLYING INVESTMENT BASIS FOR CONVERTIBLE
DEBENTURE PURCHASES WAS DESTROYED BY THE INHERENTLY
UNFAIR AND INEQUITABLE SETTLEMENT AND MERGER

The ultimate effect of the District Court's judgment and order and supporting opinion, if not vacated, would open the door to and enable the forced elimination and destruction of the right to convert into common stock of literally billions of dollars of outstanding convertible debentures in the United States. Issuers and their controlling persons through the device of squeeze-out merger, without the consent of Debenture owners, without a justifiable business purpose, without any federal or state statutory authorization, and at prices fixed practically at their will, can achieve this result by the procedure devised here.

The technique utilized by the settling parties in this case clears a path to eliminate the factor of dilution of earnings by a "squeeze-out" merger for all convertible debenture issuers who so desire to take that route. Since, as was shown in Boeing, supra, at 1381, the convertible securities market is composed primarily of individuals, it is the individual investors who will suffer from the huge gap which is opened in the law, should elimination of rights to convert into common stock be permitted in this case for a sum less than the conversion price, without the affirmative consent of each Debenture owner affected. Short of Congressional authorization under the Bankruptcy laws, the Public Utility Holding Company Act, or the Interstate Commerce Conversion Act, such involuntary readjustment of creditors' substantive rights has heretofore been unknown.

The inherent unfairness and inequity to permit such debt restructuring by a Rule 23 settlement and merger works a practical destruction of the underlying basis for convertible debenture purchases. If this right of settlement and merger is ultimately approved, it will set a unique precedent that could well foreclose the future underwriting and issuance of convertible debentures in the capital markets of the United States by issuers whose common stock is expected to rise. Thereby, such issuers will be forced to pay the then prevalent market interest rate, instead of a lower-than-market interest rate of convertible debentures. Such future increase in financing costs for such issuers could and may well amount to billions of dollars, and thus, in effect, foreclose the issuance of convertible debentures as a method of "deferred equity financing." See Kusner v. First Pennsylvania Corporation, 531 F. 2d 1234, 1237-1238 (3d Cir. 1976). No reasonable investor who was made aware that his conversion right might thus be altered would purchase such securities. Moreover, continued sale of convertible securities without specific notice of the eventuality of conversion right destruction would be a major deceit on the investing public.

The syllogistic conclusion of the District Court, in good measure derived from Broenen v. Beaunit Corporation, 305 F. Supp. 688 (E.D.Wis. 1969), aff'd 440 F. 2d 1244 (7th Cir. 1970), a completely distinguishable case in which conversion into common stock of another corporation was upheld, not conversion into a fixed sum in cash, works inherent unfairness and inequity on Debenture owners who objected and did not affirmatively consent.

CONCLUSION

For all the above stated reasons, objectors submit that:

1. The judgment and order of the District Court approving the settlement and merger should be vacated in its entirety, including without limitation, dissolving the order granting the permanent injunction contained therein.

2. This case should be remanded to the District Court with such appropriate directions as will prohibit alteration or impairment in any manner of the conversion rights into common stock of all Debentures owned by objectors and other owners thereof without the affirmative consent of each Debenture owner affected.

Respectfully submitted,

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ADDENDUM

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CONSTITUTION OF THE UNITED STATES
ARTICLE I, SECTION 10

No State shall...pass any...Law impairing the Obligation of
Contracts....

CONSTITUTION OF
THE UNITED STATES

AMENDMENT V

No person shall...be deprived of life, liberty, or property,
without due process of law....

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1

No State shall...deprive any person of life, liberty, or property, without due process of law....

The Rules Enabling Act,
28 U.S.C. Section 2072

§ 2072. Rules of civil procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

As amended Nov. 6, 1966, Pub.L. 89-773, § 1, 80 Stat. 1323.

Federal Rule of Civil Procedure 23

(Class Actions)

1 Rule 23. Class Actions.

2 (a) PREREQUISITES TO CLASS ACTION. One or more members
3 of a class may sue or be sued as representative parties on
4 behalf of all only if (1) the class is so numerous that
5 joinder of all members is impracticable, (2) there are
6 questions of law or fact common to the class, (3) the claims
7 or defenses of the representative parties are typical of the
8 claims or defenses of the class, and (4) the representative
9 parties will fairly and adequately protect the interests of
10 the class.

11 (b) CLASS ACTIONS MAINTAINABLE. An action may be
12 maintained as a class action if the prerequisites of sub-
13 division (a) are satisfied, and in addition:

14 (1) the prosecution of separate actions by or against
15 individual members of the class would create a risk of

16 (A) inconsistent or varying adjudications with re-
17 spect to individual members of the class which would
18 establish incompatible standards of conduct for the
19 party opposing the class, or

20 (B) adjudications with respect to individual mem-
21 bers of the class which would as a practical matter be
22 dispositive of the interests of the other members not
23 parties to the adjudications or substantially impair or
24 impede their ability to protect their interests; or

25 (2) the party opposing the class has acted or refused
26 to act on grounds generally applicable to the class,
27 thereby making appropriate final injunctive relief or
28 corresponding declaratory relief with respect to the
29 class as a whole; or

30 (3) the court finds that the questions of law or fact
31 common to the members of the class predominate over
32 any questions affecting only individual members, and
33 that a class action is superior to other available methods
34 for the fair and efficient adjudication of the controversy.
35 The matters pertinent to the findings include: (A) the
36 interest of members of the class in individually control-
37 ling the prosecution or defense of separate actions; (B)
38 the extent and nature of any litigation concerning the
39 controversy already commenced by or against members
40 of the class; (C) the desirability or undesirability of con-
41 centrating the litigation of the claims in the particular
42 forum; (D) the difficulties likely to be encountered in the
43 management of a class action.

Federal Rule of Civil Procedure 23 Continued

44 (c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO
45 BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED
46 PARTIALLY AS CLASS ACTIONS.

47 (1) As soon as practicable after the commencement of

48 an action brought as a class action, the court shall deter-
49 mine by order whether it is to be so maintained. An order
50 under this subdivision may be conditional, and may be
51 altered or amended before the decision on the merits.

52 (2) In any class action maintained under subdivision
53 (b)(3), the court shall direct to the members of the class
54 the best notice practicable under the circumstances, in-
55 cluding individual notice to all members who can be identi-
56 fied through reasonable effort. The notice shall advise each
57 member that (A) the court will exclude him from the class
58 if he so requests by a specified date; (B) the judgment,
59 whether favorable or not, will include all members who do
60 not request exclusion; and (C) any member who does not
61 request exclusion may, if he desires, enter an appearance
62 through his counsel.

63 (3) The judgment in an action maintained as a class
64 action under subdivision (b)(1) or (b)(2), whether or not
65 favorable to the class, shall include and describe those
66 whom the court finds to be members of the class. The judg-
67 ment in an action maintained as a class action under sub-
68 division (b)(3), whether or not favorable to the class, shall
69 include and specify or describe those to whom the notice
70 provided in subdivision (c)(2) was directed, and who have
71 not requested exclusion, and whom the court finds to be
72 members of the class.

Federal Rule of Civil Procedure 23 Continued

73 (4) When appropriate (A) an action may be brought or
74 maintained as a class action with respect to particular
75 issues, or (B) a class may be divided into subclasses and
76 each subclass treated as a class, and the provisions of this
77 rule shall then be construed and applied accordingly.

78 (d) ORDERS IN CONDUCT OF ACTIONS. In the conduct of ac-
79 tions to which this rule applies, the court may make ap-
80 propriate orders: (1) determining the course of proceed-
81 ings or prescribing measures to prevent undue repetition
82 or complication in the presentation of evidence or argu-
83 ment; (2) requiring, for the protection of the members of
84 the class or otherwise for the fair conduct of the action,
85 that notice be given in such manner as the court may
86 direct to some or all of the members of any step in the

87 action, or of the proposed extent of the judgment, or of
88 the opportunity of members to signify whether they con-
89 sider the representation fair and adequate, to intervene
90 and present claims or defenses, or otherwise to come into
91 the action; (3) imposing conditions on the representative
92 parties or on intervenors; (4) requiring that the plead-
93 ings be amended to eliminate therefrom allegations as to
94 representation of absent persons, and that the action
95 proceed accordingly; (5) dealing with similar procedural
96 matters. The orders may be combined with an order
97 under Rule 16, and may be altered or amended as may be
98 desirable from time to time.

99 (e) DISMISSAL OR COMPROMISE. A class action shall not
100 be dismissed or compromised without the approval of the
101 court, and notice of the proposed dismissal or compro-
102 mise shall be given to all members of the class in such
103 manner as the court directs.

Federal Rule of Civil Procedure 59(e)
(Motion to Alter or Amend Judgment)

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Federal Rule of Civil Procedure 65(d)
(Form and Scope of Injunction)

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Section 2(10) of the Securities Act of 1933,
15 U.S.C. § 77b(10)

§ 77b. Definitions

When used in this subchapter, unless the context otherwise requires—

(10) The term "prospectus" means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security; except that (a) a communication sent or given after the effective date of the registration statement (other than a prospectus permitted under subsection (b) of section 77j of this title) shall not be deemed a prospectus if it is proved that prior to or at the same time with such communication a written prospectus meeting the requirements of subsection (a) of section 77j of this title at the time of¹ such communication was sent or given to the person to whom the communication was made, and (b) a notice, circular, advertisement, letter, or communication in respect of a security shall not be deemed to be a prospectus if it states from whom a written prospectus meeting the requirements of section 77j of this title may be obtained and, in addition, does no more than identify the security, state the price thereof, state by whom orders will be executed, and contain such other information as the Commission, by rules or regulations deemed necessary or appropriate in the public interest and for the protection of investors, and subject to such terms and conditions as may be prescribed therein, may permit.

Section 3(a)(10) of the Securities Act of 1933,
15 U.S.C. § 77c(a)(10)

§ 77c. Exempted securities

(a) Except as hereinafter expressly provided, the provisions of this subchapter shall not apply to any of the following classes of securities:

(10) Any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval;

Section 5(c) of the Securities Act of 1933,
15 U.S.C. § 77e(c)

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding of examination under section 8. [As added by Act of August 10, 1954, effective October 9, 1954, Sec. 7, 68 Stat. 684.]

Section 17(a) of the Securities Act of 1933,
15 U.S.C. § 77q(a)

Sec. 17. (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

- (1) to employ any device, scheme or artifice to defraud, or
- (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Section 17(c) of the Securities Act of 1933,
15 U.S.C. § 77q(c)

(c) The exemptions provided in section 77c of this
title shall not apply to the provisions of this section.

Sec. 10(b) of the Securities Exchange Act
of 1934, 15 U.S.C. 78j(b)

\$78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

* * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5

17 C.F.R. §240.10b-5 Employment of manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Section 13(d)(1) of the Securities Exchange Act
of 1934, 15 U.S.C. §78m(d)(1)

Sec. 13

(d)(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 12 of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 12(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors—

(A) the background and identity of all persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price or proposed purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 3(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the name and address of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

[As added by Act of July 29, 1968, Sec. 2, 82 Stat. 454; amended by Act of December 22, 1970, Sec. 1(a), Public Law 91-567.]

Section 13(e) (1) of the Securities Exchange
Act of 1934, 15 U.S.C. §78m(e) (1)

Sec. 13

(e)(1) It shall be unlawful for an issuer which has a class of equity securities registered pursuant to section 12 of this title, or which is a closed-end investment company registered under the Investment Company Act of 1940, to purchase any equity security issued by it if such purchase is in contravention of such rules and regulations as the Commission, in the public interest or for the protection of investors, may adopt (A) to define acts and practices which are fraudulent, deceptive, or manipulative, and (B) to prescribe means reasonably designed to prevent such acts and practices. Such rules and regulations may require such issuer to provide holders of equity securities of such class with such information relating to the reasons for such purchase, the source of funds, the number of shares to be purchased, the price to be paid for such securities, the method of purchase, and such additional information, as the Commission deems necessary or appropriate in the public interest or for the protection of investors, or which the Commission deems to be material to a determination whether such security should be sold. [As added by Act of July 29, 1968, Sec. 2, 82 Stat. 455.]

Sections 14(d)(1), 14(4), and 14(e) of the
Securities Exchange Act of 1934, 15 U.S.C.
§§78n(d)(1), 78n(d)(4), and 78n(e)

Sec. 14

(d)(1) It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 78l of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78l(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in section 78m(d) of this title, and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may by rules and regulations prescribe. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of

investors, and shall be filed with the Commission not later than the time copies of such material are first published or sent or given to security holders. Copies of all statements, in the form in which such material is furnished to security holders and the Commission, shall be sent to the issuer not later than the date such material is first published or sent or given to any security holders.

Sec. 14

(d)(4) Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Sec. 14

(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

Section 306(a)(1) of the Trust Indenture Act
of 1939, 15 U.S.C. §77fff(a)(1)

§77fff. Securities not registered under
Securities Act

(a) In the case of any security which is not registered under the Securities Act of 1933 and to which this subsection is applicable notwithstanding the provisions of section 77ddd of this title unless such security has been or is to be issued under an indenture and an application for qualification is effective as to such indenture, it shall be unlawful for any person, directly or indirectly--

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise....

Section 253 Delaware General Corporation Law
(As amended 7/1/76)

§253. MERGER OF PARENT CORPORATION AND SUBSIDIARY OR SUBSIDIARIES.--(a) In any case in which at least 90 per cent of the outstanding shares of each class of the stock of a corporation or corporations is owned by another corporation and one of such corporations is a corporation of this State and the other or others are corporations of this State or of any other state or states or of the District of Columbia and the laws of such other state or states or of the District permit a corporation of such jurisdiction to merge with a corporation of another jurisdiction, the corporation having such stock ownership may either merge such other corporation or corporations into itself and assume all of its or their obligations, or merge itself, or itself and one or more of such other corporations, into one of such other corporations by executing, acknowledging and filing, in accordance with section 103 of this title, a certificate of such ownership and merger setting forth a copy of the resolution of its board of directors to so merge and the date of the adoption thereof; provided, however, that in case the parent corporation shall not own all the outstanding stock of all the subsidiary corporations, parties to a merger as aforesaid, the resolution of the board of directors of the parent corporation shall state the terms and conditions of the merger, including the securities, cash, property, or rights to be issued, paid, delivered or granted by the surviving corporation upon surrender of each share of the subsidiary corporation or corporations not owned by the parent corporation. If the parent corporation be not the surviving corporation, the resolution shall include provision for the pro rata issuance of stock of the surviving corporation to the holders of the stock of the parent corporation on surrender of the certificates therefor, and the certificate of ownership and merger shall state that the proposed merger has been approved by a majority of the outstanding stock of the parent corporation entitled to vote thereon at a meeting thereof duly called and held after 20 days notice of the purpose of the meeting mailed to each such stockholder at his address

as it appears on the records of the corporation. A certified copy of the certificate shall be recorded in the office of the Recorder of the County in this State in which the registered office of each constituent corporation which is a corporation of this State is located. If the surviving corporation exists under the laws of the District of Columbia or any state other than this State, the provisions of section 252(d) of this title shall also apply to a merger under this section.

(b) If the surviving corporation is a Delaware corporation, it may change its corporate name by the inclusion of a provision to that effect in the resolution of merger adopted by the directors of the parent corporation and set forth in the certificate of ownership and merger, and upon the effective date of the merger, the name of the corporation shall be so changed.

(c) The provisions of Section 251(d) of this title shall apply to a merger under this section, and the provisions of Section 251(e) shall apply to a merger under this section in which the surviving corporation is the subsidiary corporation and is a corporation of this State. Any merger which effects any changes other than those authorized by this section or made applicable by this subsection shall be accomplished under the provisions of Section 251 or Section 252 of this title. The provisions of section 262 of this title shall not apply to any merger effected under this section, except as provided in subsection (d) of this section.

(d) In the event all of the stock of a subsidiary Delaware corporation party to a merger effected under this Section is not owned by the parent corporation immediately prior to the merger, the stockholders of the subsidiary Delaware corporation party to the merger shall have appraisal rights and the surviving corporation shall comply with the provisions of subsection (b)(2) of §262 of this Title. Thereafter, the surviving corporation and the stockholders shall have such rights and duties and shall follow the procedures set forth in subsections (c) to (j) inclusive, of §262 of this Title.

(e) A merger may be effected under this section although one or more of the corporations parties to the merger is a corporation organized under the laws of a jurisdiction other than one of the United States; provided that the laws of such jurisdiction permit a corporation of such jurisdiction to merge with a corporation of another jurisdiction; and provided further that the surviving or resulting corporation shall be a corporation of this State.

Section 259 - Delaware General
Corporation Law

§259. Status, rights, liabilities, etc., of constituent and surviving or resulting corporations following merger or consolidation

(a) When any merger or consolidation shall have become effective under this chapter, for all purposes of the laws of this State the separate existence of all the constituent corporations, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into one of such corporations, as the case may be, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, and being subject to all the restrictions, disabilities and duties of each of such corporations so merged or consolidated; and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, as well for stock subscriptions as all other things in action or belonging to each of such corporations shall be vested in the corporation surviving or resulting from such merger or consolidation; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation as they were of the several and respective constituent corporations, and the title to any real estate vested by deed or otherwise, under the laws of this State, in any of such constituent corporations, shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

(b) In the case of a merger of banks or trust companies, without any order or action on the part of any court or otherwise, all appointments, designations, and nominations, and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, trustee of estates of persons mentally ill and in every other fiduciary capacity, shall be automatically vested in the corporation resulting from or surviving such merger; provided, however, that any party in interest shall have the right to apply to an appropriate court or tribunal for a determination as to whether the surviving corporation shall continue to serve in the same fiduciary capacity as the merged corporation, or whether a new and different fiduciary should be appointed.

Section 262 - Delaware General Corporation
Law (as amended 7/1/76)

§262. PAYMENT FOR STOCK OR MEMBERSHIP OF PERSON OBJECTING TO MERGER OR CONSOLIDATION.--(a) Appraisal rights under this Section shall be available only for the shares of any stockholder who has complied with the provisions of subsection (b) of this Section and has neither voted in favor of the merger nor consented thereto in writing pursuant to §228. When used in this Section, the word "stockholder" means a holder of record of stock in a stock corporation and also a member of record of a non-stock corporation; the words "stock" and "share" mean and include what is ordinarily meant by those words and also membership or membership interest of a member of a non-stock corporation.

(b) Appraisal rights under this Section shall be determined as follows:

(1) If a proposed merger or consolidation for which appraisal rights are provided under this Section is to be submitted for approval at a meeting of stockholders, the corporation, not less than 20 days prior to the meeting, shall notify each of its stockholders entitled to such appraisal rights that appraisal rights are available for any or all of the shares of the constituent corporations, and shall include in such notice a copy of this Section. Each stockholder electing to demand the appraisal of his shares under this Section shall deliver to the corporation, before the taking of the vote on the merger or consolidation, a written demand for appraisal of his shares. Such demand will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of his shares; provided, however, that such demand must be in addition to and separate from any proxy or vote against the merger. Within 10 days after the effective date of such merger or consolidation, the surviving corporation shall notify each

stockholder of each constituent corporation who has complied with the provisions of this subsection and has not voted in favor of or consented to the merger or consolidation of the date that the merger or consolidation has become effective; or

(2) If the merger or consolidation was approved pursuant to §228 or §253 of this Chapter, the surviving corporation, either before the effective date of the merger or within 10 days thereafter, shall notify each of the stockholders entitled to appraisal rights of the effective date of the merger or consolidation that appraisal rights are available for any or all of the shares of the constituent corporations. A copy of this Section shall be included in the notice. The notice shall be sent by certified or registered mail, return receipt requested, addressed to the stockholder at his address as it appears on the records of the corporation. Any stockholder entitled to appraisal rights may, within 20 days after the date of mailing of the notice, demand in writing from the surviving corporation the appraisal of his shares. Such demand will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of his shares.

(c) Within 120 days after the effective date of the merger or consolidation, the corporation or any stockholder who has complied with the provisions of subsections (a) and (b) hereof and who is otherwise entitled to appraisal rights under this Section, may file a petition in the Court of Chancery demanding a determination of the value of the stock of all such stockholders. Notwithstanding the foregoing, at any time within 60 days after the effective date of the merger or consolidation, any stockholder shall have the right to withdraw his demand for appraisal and to accept the terms offered upon the merger or consolidation.

(d) Upon the filing of any such petition by a stockholder, service of a copy thereof shall be made upon the corporation, which shall within ten days after such service file in the office of the Register in Chancery in which the petition was filed a duly verified list containing the names and addresses of all stockholders who have demanded payment for their shares and with whom agreements as to the value of their shares have not been reached by the corporation. If the petition shall be filed by the corporation, the petition shall be accompanied by such a duly verified list. The Register in Chancery shall give notice of the time and place fixed for the hearing of such petition by registered or certified mail to the corporation and to the stockholders shown upon the list at the addresses therein stated, and notice shall also be given by publishing a notice at least once at least one week before the day of the hearing, in a newspaper of general circulation published in the City of Wilmington, Delaware. The Court may direct such additional publication of notice as it deems advisable. The forms of the notices by mail and by publication shall be approved by the Court.

(e) After the hearing on such petition, the Court shall determine the stockholders who have complied with the provisions of this Section and who have become entitled to appraisal rights under this Section. The Court may require the stockholders who demanded payment for their shares to submit their certificates of stock to the Register in Chancery for notation thereon of the pendency of the appraisal proceedings; and if any stockholder fails to comply with such direction, the Court may dismiss the proceedings as to such stockholder.

(f) After the determination of the stockholders entitled to an appraisal, the Court shall appraise the shares, determining their fair value exclusive of any element of value arising from the accomplishment or expectation of the merger. Upon application by any stockholder entitled to participate in the appraisal proceeding or by the corporation, the Court may,

in its discretion, permit discovery or other pretrial proceedings and may proceed to trial upon the appraisal prior to the final determination of those other stockholders who have complied with this Section. Any stockholder whose name appears on the list filed by the corporation pursuant to subsection (d) of this Section and who has submitted his certificates of stock to the Register in Chancery, if such is required, may participate fully in all proceedings until the Court shall determine that he is not entitled to appraisal rights under this Section.

(g) The Court shall direct the payment of the appraised value of the shares, together with interest, if any, by the surviving or resulting corporation to the stockholders entitled thereto upon the surrender to the corporation of the certificates representing such stock. The Court's decree may be enforced as other decrees in the Court of Chancery may be enforced, whether such surviving or resulting corporation be a corporation of this State or of any other State.

(h) The costs of the proceeding may be determined by the Court and taxed upon the parties as the Court deems equitable in the circumstances. Upon the application of any party in interest, the Court shall determine the amount of interest, if any, to be paid upon the value of the stock of the stockholders entitled thereto. In making its determination with respect to interest, the Court may consider all relevant factors, including the rate of interest which the corporation has paid for money it has borrowed, if any, during the pendency of the proceeding. Upon application of a stockholder, the Court may order all or a portion of the expenses incurred by any stockholder in connection with the appraisal proceeding, including, without limitation, reasonable attorney's fees and the fees and expenses of experts, to be charged pro rata against the value of all of the shares entitled to an appraisal.

(i) Any stockholder who has demanded his appraisal rights as provided in subsection (b) of this Section shall thereafter neither be entitled to vote such stock for any purpose nor be entitled to the payment of dividends or other distribution on the stock (except dividends or other distributions payable to stockholders of record at a date which is prior to the effective date of the merger or consolidation); provided, however, that if no petition for an appraisal shall be filed within the time provided in subsection (c) of this Section, or if such stockholder shall deliver to the corporation a written withdrawal of his demand for an appraisal and an acceptance of the merger or consolidation, either within 60 days after the effective date of the merger or consolidation as provided in subsection (c) of this Section or thereafter with the written approval of the corporation, then the right of such stockholder to appraisal shall cease. Notwithstanding the foregoing, no appraisal proceeding in the Court of Chancery shall be dismissed as to any stockholder without the approval of the Court, and such approval may be conditioned upon such terms as the Court deems just.

(j) The shares of the surviving or resulting corporation into which the shares of such objecting stockholders would have been converted had they assented to the merger or consolidation shall have the status of authorized and unissued shares of the surviving or resulting corporation.

(k) Unless otherwise provided in the certificate of incorporation of the corporation issuing such shares, no appraisal rights under this Section shall be available for the shares of any class or series of stock which, at the record date fixed to determine the stockholders entitled to receive notice of and to vote at the meeting of stockholders to act upon the agreement of merger or consolidation, were either (1) listed on a national securities exchange or (2) held of record by more than 2,000 stockholders.

No appraisal rights shall be available for any shares of stock of the constituent corporation surviving a merger if the merger did not require for its approval the vote of the stockholders of the surviving corporation as provided in subsection (f) of §251 of this Title.

(1) Notwithstanding the provisions of subsection (k) of this Section, appraisal rights under this Section shall be available for the shares of any class or series of stock of a constituent corporation if the holders thereof are required by the terms of an agreement of merger or consolidation pursuant to §251 or §252 of this Title to accept for such stock anything except (1) shares of stock of the corporation surviving or resulting from such merger or consolidation; (2) shares of stock of any other corporation which at the effective date of the merger or consolidation will be either listed on a national securities exchange or held of record by more than 2,000 shareholders; (3) cash in lieu of fractional shares of the corporations described in clauses (1) and (2) of this subsection; or (4) any combination of the shares of stock and cash in lieu of fractional shares described in clauses (1), (2) and (3) of this subsection.

Section 102, Pennsylvania Securities Act of 1972

When used in this act, the following definitions shall be applicable, unless the context otherwise requires:

(h) "Fraud," "Deceit" and "Defraud" are not limited to common law fraud or deceit.

Section 201, Pennsylvania Securities Act of 1972

70 § 1-201

§ 1—201. Registration requirement

It is unlawful for any person to offer or sell any security in this State unless the security is registered under this act or the security or transaction is exempted under section 202 or 203¹ hereof.

Section 401, Pennsylvania Securities Act of 1972

§ 1—401. Sales and purchases

It is unlawful for any person, in connection with the offer, sale or purchase of any security in this State, directly or indirectly:

- (a) To employ any device, scheme or artifice to defraud;
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
- (c) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

Section 702, Pennsylvania Securities Act of 1972

§ 1—702. Scope of act

(a) The provisions of this act concerning sales and offers to sell apply to persons who sell or offer to sell when (i) a sale or offer to sell is made in this State or when (ii) an offer to purchase is made and accepted in this State. The provisions concerning purchases and offers to purchase apply to persons who buy or offer to buy when (i) a purchase or offer to purchase is made in this State or when (ii) an offer to sell is made and accepted in this State.

(b) For the purpose of this section, an offer to sell or to purchase is made in this State, whether or not either party is then present in this State, when the offer originates from this State or is directed by the offeror to this State and received by the offeree in this State; provided, however, for the purpose of section 201 an offer to sell which is not directed to or received by the offeree in this State is not made in this State.

(c) For the purpose of this section, an offer to purchase or to sell is accepted in this State when acceptance is communicated to the offeror in this State, and has not previously been communicated to the offeror, orally or in writing, outside this State; and acceptance is communicated to the offeror in this State, whether or not either party is then present in this State, when the offeree directs it to the offeror in this State reasonably believing the offeror to be in this State, and it is received by the offeror in this State.

(d) An offer to sell or to purchase is not made in this State when the publisher circulates, or there is circulated on his behalf in this State, any bona fide newspaper or other publication of general, regular and paid circulation which is not published in this State, or a radio or television program originating outside this State is received in this State.

Section 703(a), Pennsylvania Securities Act of 1972

§ 1—703. Statutory policy

(a) This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact the "Uniform Securities Act" and to coordinate the interpretation and administration of this act with related Federal regulation.

**NOTICE OF INDIAN HEAD INC. CLASS ACTIONS, PROPOSED
SETTLEMENT AND HEARING (pp. 579a-586a)**
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD BRUCKER et al.,
Plaintiffs,

—against—

THYSSEN-BORNEMISZA EUROPE N.V.
et al.,
Defendants.

74 Civ. 5755 (CES)

WILLIAM B. WEINBERGER,
Plaintiff,

—against—

RICHARD J. POWERS et al.,
Defendants.

75 Civ. 229 (CES)

SHAMROCK CORPORATION et al.,
Plaintiffs,

—against—

INDIAN HEAD INC. et al.,
Defendants.

75 Civ. 1736 (CES)

**NOTICE OF INDIAN HEAD INC. CLASS ACTIONS,
PROPOSED SETTLEMENT AND HEARING**

TO: *All Present Owners of Indian Head Common Stock,
Convertible Debentures and Warrants*

*All Owners of Indian Head Debentures on September 27, 1973
Who Sold Them Thereafter*

*All Owners of Indian Head Debentures on July 2, 1974 Who
Sold Them Thereafter*

*All Owners of Indian Head Warrants on July 2, 1974 Who
Continue to Own Them*

*All Owners of Indian Head Warrants on July 2, 1974 Who
Sold Them Thereafter*

*All Owners of Indian Head Warrants Who Sold Them
Between August 1, 1973 and July 1, 1974.*

A PROPOSED SETTLEMENT HAS BEEN REACHED IN THE ABOVE-CAPTIONED ACTIONS. THIS NOTICE SETS OUT THE PROCEDURE BY WHICH ALL PRESENT OWNERS OF INDIAN HEAD INC. COMMON STOCK, CONVERTIBLE DEBENTURES OR WARRANTS, AND CERTAIN FORMER OWNERS OF INDIAN HEAD CONVERTIBLE DEBENTURES OR WARRANTS, MAY SHARE IN THE SETTLEMENT PROCEEDS IF THE PROPOSED SETTLEMENT IS APPROVED BY THE COURT.

1. PLEASE TAKE NOTICE THAT, pursuant to Rule 23 of the Federal Rules of Civil Procedure and pursuant to an order of the United States District Court for the Southern District of New York, dated August 2, 1976:

A. *Settlement Hearing.* A hearing will be held in the above-captioned actions in Room 2703, United States Courthouse, Foley Square, New York, New York, at 4 P.M. on October 13, 1976 ("Settlement Hearing") on an application by the parties to these actions (i) to determine the fairness, reasonableness and adequacy of the proposed settlement and whether these actions should be dismissed on the merits and with prejudice as to all defendants, and (ii) if the proposed settlement be approved, to schedule a hearing to determine allowable fees, disbursements and expenses, as hereinafter more particularly described. The Settlement Hearing may be adjourned by the Court without further notice other than an announcement in court on the above date.

B. *Class Certification.* The above-captioned actions have been ordered to be maintained as class actions for purposes of this settlement on behalf of all Owners, beneficially or of record, of the following Indian Head securities, during the periods specified:

COMMON STOCK CLASS. All Owners of Indian Head Common Stock on August 2, 1976 who have continuously owned such shares to and including the date of the proposed merger of Indian Head into Thyssen-Bornemisza Holdings, Inc. which will take place if the proposed settlement is approved (the "MERGER DATE").

DEBENTURE OWNER CLASS. All Owners of Indian Head 5½% Convertible Subordinated Debentures due April 15, 1993 ("Debentures") on August 2, 1976 who have continuously owned them to and including the MERGER DATE.

DEBENTURE SELLER CLASS A. All Owners of Debentures on September 27, 1973 who sold such Debentures between September 27, 1973 and July 1, 1974.

DEBENTURE SELLER CLASS B. All Owners of Debentures on July 2, 1974 who sold such Debentures between July 12, 1974 and August 2, 1976.

WARRANT OWNER CLASS A. All Owners of Indian Head Warrants issued pursuant to the Warrant Agreement dated as of May 15, 1965 between Indian Head and Chemical Bank ("Warrants") on August 2, 1976 who have continuously owned them to and including the MERGER DATE.

WARRANT OWNER CLASS B. All Owners of Warrants on July 2, 1974 who have held them continuously to and including the MERGER DATE.

WARRANT SELLER CLASS A. All Owners of Warrants on July 2, 1974 who sold such Warrants between July 12, 1974 and August 2, 1976.

WARRANT SELLER CLASS B. All Owners of Warrants who sold such Warrants between August 1, 1973 and July 1, 1974.

WHAT YOU WILL RECEIVE UNDER THE PROPOSED SETTLEMENT AND HOW TO OBTAIN IT

Proposed Cash Settlement Payments.

2. Under the proposed settlement, class members who accept the settlement and who comply with the procedures summarized below will receive the following cash payments:

COMMON STOCK CLASS [585,547 shares publicly outstanding]—\$32 per share:

To be paid upon the Merger and submission of your Stock Certificates together with a properly filled out Transmittal Letter which will be sent to owners of record upon the Merger.

DEBENTURE OWNER CLASS [14,293 Debentures (face value \$1,000) outstanding]—\$844.16 for each Debenture:

To be paid after the Merger and upon submission of your Debenture Certificates together with a properly filled out Transmittal Letter, which will be sent to owners of record upon the Merger, together with any required documentation.

DEBENTURE SELLER CLASS A—If you can establish that you sold any Debentures for less than \$650:

You will be entitled to be paid the difference between \$650 and your sales price (before deducting expenses of sale), *but no more than \$50 per Debenture*, provided that you fill out the enclosed green Proof of Claim; attach to the Proof of Claim brokerage confirmations, monthly statements or other written proof of ownership and sales price and mail or file it as provided in Paragraph 17 below. Any objection by defendants to your Proof of Claim will be submitted to the Court for final determination. After the Merger, you will receive payment up to \$50 per Debenture, provided the Court has not sustained any objection which may have been made to your Proof of Claim.

DEBENTURE SELLER CLASS B—If you can establish that you sold any Debentures for less than \$701:

You will be entitled to be paid the difference between \$701 and your sales price (before deducting expenses of sale), *but no more than \$100 per Debenture*, provided that you fill out the enclosed yellow Proof of Claim, attach to the Proof of Claim brokerage confirmations, monthly statements or other written proof of ownership and sales price and mail or file it as provided in Paragraph 17 below. Any objection by defendants to your Proof of Claim will be submitted to the Court for final determination. After the Merger, you will receive the payment of up to \$100 per Debenture, provided the Court has not sustained any objection which may have been made to your Proof of Claim.

WARRANT OWNER CLASS A [349,467 Warrants publicly outstanding]—\$2.50 per Warrant:

To be paid after the Merger and upon submission of your Warrant Certificates together with a properly filled out Transmittal Letter, which will be sent to owners of record upon the Merger, together with any required documentation.

WARRANT OWNER CLASS B—\$4 per Warrant:

To be paid after the Merger and upon submission of your Warrant Certificates together with a properly filled out Transmittal Letter which will be sent to owners of record, upon the Merger, together with any required documentation.

WARRANT SELLER CLASS A—\$1.50 per Warrant:

To be paid after the Merger, provided that you fill out the enclosed blue Proof of Claim, attach to the Proof of Claim brokerage confirmations, monthly statements or other written proof of ownership and sale and mail or file it as provided in Paragraph 17 below. Any objection by defendants to your Proof of Claim will be submitted to the Court for final determination. After the merger, you will receive the payment of \$1.50 per Warrant, provided the Court has not sustained any objections which may have been made to your Proof of Claim.

WARRANT SELLER CLASS B:

The Settlement makes no provision for payment to members of this Class because plaintiffs' counsel are of the opinion that members of this class can neither establish liability of the defendants, nor damages. The affidavit of plaintiffs' counsel dated July 20, 1976, on file in the Court and available for inspection, gives a more detailed explanation. Members of this Class will be bound by the proposed settlement, and thus receive no payment thereunder, unless they elect to be excluded as hereinafter provided.

Effect of Accepting Settlement.

3. By submitting a Proof of Claim or Transmittal Letter as described above, you will submit your claims to the jurisdiction of the Court and release the defendants from all claims which were or could have been asserted in these actions. If you are a class member and neither exclude yourself from the settlement in the manner prescribed below nor file a timely and proper Proof of Claim or Transmittal Letter as provided herein, you will be forever barred from recovery from the defendants with respect to all claims which are or could have been asserted in these actions.

Proposed Merger.

4. Upon entry of a Judgment and Order of the Court approving this settlement upon the terms and conditions of the Settlement Agreement, THYSSEN-BORNEMISZA, INC. ("TBI") shall cause INDIAN HEAD to be merged into THYSSEN-BORNEMISZA HOLDINGS, INC., a subsidiary which will be formed by TBI, pursuant to §253 of the Delaware Corporation Law (the "MERGER"), paying thereafter \$32 for each share of Common Stock of INDIAN HEAD issued and outstanding on the MERGER DATE to holders of Common Stock.

Esrow Payments.

5. After the MERGER DATE, TBI will pay \$12,100,000 into a Debenture Settlement Fund to be administered by MARINE MIDLAND BANK and pay \$1,450,000 into a Warrant Settlement Fund to be administered by CHEMICAL BANK, and will make such additional payments to such Funds as are necessary to effectuate the terms of the proposed settlement. The Debenture and Warrant class members will be paid by MARINE MIDLAND BANK and CHEMICAL BANK, respectively, the sums to which they are entitled from such Settlement Funds as promptly as practicable after the approval of the settlement and receipt of Proofs of Claim and Transmittal Letters.

Settlement Agreement and Court Papers.

6. The full and complete terms of the proposed settlement are contained in a Stipulation and Agreement of Settlement, as amended ("Settlement Agreement"). The Settlement Agreement, together with the pleadings and all other papers, including the Order of the Court certifying these actions as Class Actions and directing the Settlement Hearing herein described, are on file with the Clerk of the United States District Court for the Southern District of New York, Foley Square, New York, New York, and are available for inspection at any time from 9:30 A.M. to 5:00 P.M., Monday through Friday, holidays excepted, at the Office of the Clerk. Any questions you may have with respect to this Notice and the Settlement Agreement should be raised with your attorney or advisor, or directed to lead counsel for plaintiffs, WILLIAM KLEIN II, ESQ., AUSTRIAN, LANCE & STEWART, P.C., 630 Fifth Avenue, New York, New York 10020 (Tel. No. [212] 489-9500), and not with the Court. In order to determine the tax consequences, if any, of the money received pursuant to the settlement, you should consider consulting your own accountant or attorney.

Attorney Fees.

7. If the proposed settlement is approved by the Court, applications will be made by AUSTRIAN, LANCE & STEWART, P.C., lead counsel, WEINSTEIN & LEVINSON, co-counsel for the Debenture Owner Class and Debenture Seller Classes, and WOLF, HALDENSTEIN, ADLER, FREEMAN, HERZ & FRANK, co-counsel for the Warrant Owner and Warrant Seller Classes, for their fees and expenses. TBI has agreed to pay the reasonable fees and expenses of counsel for plaintiffs in the above-captioned actions in such amounts as are awarded by the Court, but not more than an aggregate amount of \$600,000.

The Settlement Hearing.

8. If you are satisfied with the proposed settlement, you need not appear at the Settlement Hearing, and your interests will be represented by plaintiffs' counsel. Any person who establishes membership in any class described herein may appear at the Settlement Hearing and show cause, if such member has any, why the proposed settlement should not be approved and the action dismissed. No person shall be heard at the Settlement Hearing unless notice of intention to appear and grounds for objection in writing, together with any supporting papers and briefs which such class member may choose to submit, are filed with the Court on or before September 28, 1976, showing due proof of service on both of the following:

Austrian, Lance & Stewart, P.C.
630 Fifth Avenue
New York, New York 10020
Lead Counsel for All Classes

Shearman & Sterling
53 Wall Street
New York, New York 10005
Attorneys for Certain Defendants

Any class member who does not make objection in the manner provided herein shall be deemed to have waived such objection and shall be forever foreclosed from making any objection (by appeal or otherwise) to the proposed settlement. The filing of an objection shall not extend the time within which a class member may file an acceptable Proof of Claim or request exclusion from a class nor exclude the objector from any judgment entered in these actions.

DESCRIPTION OF THE LITIGATION

Original Brucker Complaint.

9. On December 31, 1974 the Brucker plaintiffs on behalf of themselves and other owners of Indian Head Convertible Debentures commenced an action against a number of defendants, including INDIAN HEAD, THYSSEN-BORNEMISZA EUROPE N.V. ("TBE"), TBI and certain officers and directors of those companies. This original Brucker Complaint alleged that no notice was sent to the Debenture owners of the Tender Offers made by TBE on September 27, 1973 and July 12, 1974, as a result of which TBI acquired 90.6% of Indian Head Common Stock; the Debentures and Common Stock were delisted from the New York Stock Exchange; the Debenture owners were thereby deprived of the opportunity to convert into Common Stock and receive \$701 for each \$1,000 Debenture; and after TBE acquired control and the Debentures and Common Stock were delisted, the market price for the Debentures had fallen below \$500. (The above-entitled *Weinberger* action, commenced in January 1975, made similar complaints on behalf of Debenture owners, and the above-entitled *Shamrock* action, commenced in April, 1975 on behalf of Indian Head Warrant owners, alleged that the terms of the Tender Offers were unfair.)

Brucker Amended Complaint.

10. On February 20, 1976 the Brucker plaintiffs filed an Amended Complaint on behalf of all Indian Head Common Stock and Warrant owners, as well as Debenture owners, alleging that TBE had proposed on February 12, 1976 to merge Indian Head into a TBE subsidiary, on unfair and unlawful terms: \$779 for the Debentures, which were then redeemable at \$1,033; \$30 for the Common Stock; and the Warrants, which were exercisable at the same \$30 price as was being offered the Common Stock, would receive nothing. It further alleged that the merger was a redemption of the Debentures at \$1,033; the failure to notify the Debenture owners of the tenders created a default causing the \$1,000 principal to be due and payable; the merger had no business purpose; and TBE had used its majority control of Indian Head to dictate unfair prices to the members of all classes. (An Amended Complaint filed in the *Shamrock* action on March 4, 1976, made similar allegations on behalf of Warrant holders and Common Stock holders.) A preliminary injunction was requested to stop the merger, and on the return date of the preliminary injunction hearing the proposed merger was withdrawn ("Withdrawn Merger Proposal").

Second Amended Complaint.

11. On July 20, 1976, the Brucker plaintiffs filed, in connection with the proposed settlement, a Second Amended Complaint which embodied the facts, circumstances and allegations contained in the various proceedings since the litigation commenced. The plaintiffs include two Warrant holders owning an aggregate of 9,100 Warrants, and an owner of 32 shares of Common Stock. In addition to the allegations in the prior complaints, it was alleged that both tender offers were made in violation of the rights of Warrant owners.

Defendants' Denial of Liability.

12. The defendants, while denying all liability on the charges made in the actions, maintaining their innocence of any wrongdoing, and relying upon the stipulation that the settlement shall not in any event be construed as or deemed to be evidence or an admission or concession on the part of the settling defendants or any of them, of any liability or wrongdoing whatsoever, consider it desirable that the actions be settled. Such settlement is desired to avoid further expense, to preserve and protect their business reputations, to dispose of burdensome and protracted litigation and to permit the merger of Indian Head into a subsidiary of TBI to proceed unhampered by expensive litigation and the distraction and diversion of its executive personnel; and they have accordingly agreed to the settlement on the terms stated in the Settlement Agreement.

Plaintiffs' Counsel's Recommendation of Settlement.

13. Plaintiffs, by their attorneys and experts, have made a thorough and detailed investigation of the facts, circumstances and transactions involved in this action, and have conducted an extensive investigation of the ten year-documentary record underlying the transactions involved in the above-captioned actions and of the financial, market and economic aspects thereof. After taking into account the likelihood that this litigation, if not settled now, will be protracted and extensive, involving uncertain questions of establishing liability

and difficulties in establishing damages, the risks inherent in litigation and potential time-consuming appeals, counsel for the plaintiffs have concluded that it would be in the best interests of plaintiffs and the classes to settle the actions on the terms of the proposed settlement.

In counsel's opinion (and taking into account that the Debentures and Warrants expire in 1993 and 1990, respectively), the class members will receive as much in settlement, and possibly more, than they might be awarded in damages, after trial, assuming they could obtain a judgment on liability, which plaintiffs' counsel deems questionable. Thus, the Warrant owner on July 2, 1974 who continues as an owner on the Merger Date receives \$4 compared to nothing in the Withdrawn Merger Proposal and approximately \$4.50 in the market prior to the July 12, 1974 tender offer. \$844.16 for the Debentures compares to the \$1,000 face amount, the \$701 requested in the original Brucker Complaint and \$420—\$480 in the market after the Debentures were delisted from the New York Stock Exchange in September 1974. \$32 for the Common Stock is \$5 more than the tender offers and \$10 more than the market price before the 1974 tender offer. The market prices on February 11, 1976, the day before the Withdrawn Merger Proposal was announced, were: Warrants: \$2; Common Stock: \$24; and for a \$1,000 Debenture, \$600.

Purpose of Notice.

14. This Notice is being sent to you in the belief that you are an owner of Common Stock of Indian Head or that you are or were an owner of Debentures or Warrants and that your rights may be affected by these actions and the proceedings described in this Notice. This Notice is not an expression of any opinion by the Court as to the merits of any claim or defense in these actions, but is solely to inform you of the pendency of the actions and of the proposed settlement described herein, so that you may decide what steps you may wish to take in relation to these actions and the proposed settlement. Former Owners of Indian Head Common Stock who tendered their shares in either of the two Tender Offers described above are not affected by nor a part of the proposed settlement and, therefore, are not being sent notice thereof.

SPECIAL NOTICE TO BROKERAGE FIRMS AND OTHER FINANCIAL INSTITUTIONS

15. All brokerage firms and other financial institutions which are or were or whose nominees are or were the record owners of Common Stock, Debentures or Warrants are directed, by Order of the Court, to transmit any Notices received to all persons who by their records are shown to be beneficial owners or former owners of Common Stock, Debentures or Warrants who are members of any class designated herein and any Proofs of Claim received to all such former beneficial owners who are members of the Debenture Seller Classes or Warrant Seller Class A, are further directed to request from the Clerk of the United States District Court for the Southern District of New York, P.O. Box 1046, New York, New York 10005, such additional Notices and Proofs of Claim as are necessary to comply with the Court's Order, and shall be reimbursed by TBI, upon written request, for the reasonable and necessary expenses of complying with the Court's Order described in this paragraph.

Settlement Conditions.

16. This proposed settlement is subject to and will not become effective until final approval by the District Court. TBI has the option to terminate the Settlement Agreement if:

(a) Requests for exclusion from the settlement (see below) are returned by persons who, had they been members of the Common Stock Class and had not elected to be excluded therefrom, would have been entitled by reason of their Common Stock Class membership to more than \$500,000 in aggregate amount under the terms of the Settlement Agreement or the Merger; or

(b) A judgment and order of the Court approving this proposed settlement upon the terms and conditions of the Settlement Agreement, including the Merger, is not entered within thirty (30) days following the conclusion of the Settlement Hearing; or

(c) The Merger is stayed or enjoined or cannot be effected for any reason.

PROOF OF CLAIM BY SELLERS OF DEBENTURES OR WARRANTS

Filing of Claims.

17. A green, yellow or blue Proof of Claim is enclosed to those who are believed to be members of Debenture Seller Classes A or B or Warrant Seller Class A. The green Proof of Claim is to be promptly filled out by members of Debenture Seller Class A; the yellow Proof of Claim by Debenture Seller Class B; and the blue Proof of Claim by Warrant Seller Class A. Each such Proof of Claim must be mailed either to the address designated therein or filed with the Court no later than November 24, 1976. A stamped return envelope is enclosed so that you can insert in it the Proof of Claim, accompanied by written evidence of your purchases and sales. Any class member who fails to mail a valid and timely request for exclusion and who fails to submit a Proof of Claim by such date shall be precluded from sharing in the distribution of the Settlement Funds, but will in all other respects be subject to the provisions of the Settlement Agreement and any judgment or orders entered pursuant thereto. A Proof of Claim shall be deemed submitted when posted if it has been properly filled out and signed, a postmark is indicated on the envelope, and it is mailed postage prepaid, addressed in accordance with the instructions given therein. (To be sure of a proper postmark, you should take the envelope to a Post Office window for hand stamping with a date).

Review of Claims.

18. Proofs of Claim and Transmittal Letters submitted by members of the various Debenture classes will be reviewed by Marine Midland Bank, and those submitted by members of the various Warrant classes will be reviewed by Chemical Bank. Any questions concerning the payment or nonpayment of any Proofs of Claim or Transmittal Letters will be referred to Austrian, Lance & Stewart, P.C., lead counsel for the classes, and Shearman & Sterling, counsel for certain defendants. Any questions unresolved by such counsel will be submitted to the Court for final determination. Payment to any class member who participates in an appeal of a judgment approving the proposed settlement will be withheld until the determination of such appeal.

Payment of Expenses.

19. TBI shall pay all costs and expenses incurred in connection with the administration and distribution of the respective Settlement Funds and processing Proofs of Claim and Transmittal Letters and all costs and expenses incurred in the mailing and publication of this Notice, Proofs of Claim and Transmittal Letters.

CONSIDERATIONS AFFECTING RIGHTS OF SECURITY HOLDERS

Common Stock Owners.

20. After the Merger Date each holder of Common Stock, whether or not a member of the Common Stock Class, will be entitled pursuant to the Merger to a cash payment of \$32 per share in cancellation of each share of such Common Stock. Each owner of record of Common Stock on the Merger Date will have appraisal rights under the laws of the State of Delaware, so that such owner who elects not to accept \$32 per share pursuant to the Merger may seek appraisal of the value of the Common Stock owned.

Debenture Owners.

21. A member of the Debenture Owner Class is not required to submit the Debenture(s) and accept the \$844.16 payment for each Debenture owned. Such member is entitled to hold the Debenture(s) and receive periodic interest payments when due and principal payments at maturity. However, upon consummation of the Merger contemplated by the Settlement Agreement, an owner of Debentures will no longer have the right to convert such Debentures into Common Stock, but will be entitled only to receive a cash payment of \$831.17 upon surrender for conversion of each Debenture. Interest in the amount of \$27.50 per \$1,000 principal amount of Debentures is payable on October 15, 1976 to holders of record on September 30, 1976. Any owner of Debentures who desires to convert such Debentures into Common Stock prior to the Merger in order to exercise the right of appraisal under Delaware law should discuss the advisability of such action with the owner's legal and financial advisors. A conversion of the Debentures into Common Stock will result in the exclusion of the Debenture Owner from the Debenture Owner Class, thereby rendering the owner ineligible to receive the benefits of the Settlement Agreement.

Warrant Owners.

22. A member of Warrant Owner Classes A or B is not required to submit the Warrants and accept the \$2.50 or \$4 payments provided by the Settlement Agreement. However, upon consummation of the Merger contemplated by the Settlement Agreement, an owner of Warrants will no longer have the right to exercise the Warrants for the purchase of Common Stock, but will be entitled only to receive a cash payment of \$32 upon surrender of each Warrant and the payment to Indian Head of the then exercise price (currently \$30 per Warrant). In addition, any owner of Warrants who desires to exercise the Warrants to purchase Common Stock prior to the Merger in order to exercise a right of appraisal under Delaware law should discuss the advisability of such action with the owner's legal and financial advisors. Such exercise of the right to purchase Common Stock will result in the exclusion of the Warrant Owner from any Warrant Owner Class, thereby rendering the owner ineligible to receive the benefits of the Settlement Agreement.

ELECTION TO BE EXCLUDED FROM CLASS ACTION

Written Request.

23. Any class member may elect to be excluded from a class by mailing to the Clerk, United States District Court, Southern District of New York, P.O. Box 1046, New York, N.Y. 10005, written request for exclusion on or before September 28, 1976. Any class member requesting exclusion from the proposed settlement must state in writing:

- (a) The member's name, address and telephone number;
- (b) The number of shares of Common Stock, principal amount of Debentures and number of Warrants the member purchased and sold; and
- (c) The number of shares of Common Stock, principal amount of Debentures and number of Warrants the member continues to own.

Consequences of Exclusion.

24. A class member making a request for exclusion will not share in the benefits of the settlement, will not be bound by any judgment entered in the above-captioned actions, and will only be able to pursue the member's individual claim, if any. Failure to submit a request for exclusion by September 28, 1976 will result in a class member being bound by the terms of any judgment or order in the above-captioned actions, including a judgment and order approving the proposed settlement.

Dated: New York, New York
August 2, 1976

By Order of the Court:
Clerk of the United States District Court
For the Southern District of New York

CERTIFICATE OF SERVICE

Re: 76-7578
Brucker v. Thyssen-Bornemisza Europe, etal

STATE OF NEW JERSEY :
: ss.:
COUNTY OF MIDDLESEX :

I, Muriel Mayer, being duly sworn according to law, and being over the age of 21 upon my oath depose and say that: I am retained by the attorney for the above named Appellants.

That on the 19th day of January , 1977, I served the within Brief and Appendix

in the matter of Edward Brucker, etal v. Thyssen-Bornemisza Europe, N.V., etal upon (See attached list)

by depositing one/ true copy of the Appendix (2 Vols.) and two (2) true copies of the ~~same~~ Brief securely enclosed in a post-paid wrapper, in an official depository maintained by the United States Government.

Muriel Mayer
Muriel Mayer

Sworn to and subscribed
before me this 19th day
of January 1977.

Lorraine Leotta
A Notary Public of the
State of New Jersey.

LORRAINE LEOTTA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 13, 1977

Brucker v. Thyssen-Bornemisza Europe, etal

Austrian, Lance & Stewart, P.C.
630 Fifth Avenue
New York, New York 10020

Shearman & Sterling, Esqs.
53 Wall Street
New York, New York 10005

Richard J. Cutler, Esq.
1211 Avenue of the Americas
New York, New York 10036

Cravath, Swaine & Moore, Esqs.
One Chase Manhattan Plaza
New York, New York 10005

Weinstein & Levinson, Esqs.
11 Park Place
New York, New York 10007

Wolf, Haldenstein, Adler, Freeman
Herz & Frank, Esqs.
270 Madison Avenue
New York, New York 10016

CERTIFICATE OF SERVICE

Re: 76-7578

Brucker v. Thyssen-Bornemisza Europe,
etal

STATE OF NEW JERSEY :
: ss.:
COUNTY OF MIDDLESEX :

I, Muriel Mayer, being duly sworn according to law, and being over the age of 21 upon my oath depose and say that: I am retained by the attorney for the above named Appellants.

That on the 28th day of January , 1977, I served the within
Corrected Brief

In the matter of Brucker v. Thyssen-Bornemisaz Europe, N.V., etal
upon (See attached list)

by depositing two (2) true copies of the same securely enclosed
in a post-paid wrapper, in an official depository maintained by the
United States Government.

Muriel Mayer
Muriel Mayer

Sworn to and subscribed
before me this 28th day
of January 1977.

Lorraine Leotta
A Notary Public of the
State of New Jersey.
LORRAINE LEOTTA

NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 13, 1977

Brucker v. Thyssen-Bornemisza Europe, etal

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